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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

MISC. NO. 75-6527

October Term, 1975

JAMES INGRAHAM, by his mother and next  
friend, ELOISE INGRAHAM and ROOSEVELT  
ANDREWS, by his father and next friend,  
WILLIE EVERETT,

Petitioners,

-vs-

WILLIE J. WRIGHT, I; LEMMIE DELIFORD;  
SOLOMON BARNES; EDWARD L. WHIGHAM and;  
THE DADE COUNTY SCHOOL BOARD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS, FIFTH  
CIRCUIT

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The Petitioners, by undersigned counsel, respectfully  
request that a Writ of Certiorari issue to review the judgment  
and opinion of the United States Court of Appeals for the Fifth  
Circuit entered on January 8, 1976.

OPINION BELOW

The opinion of the Court of Appeals, en banc, is reported  
at 525 F.2d 909. The original panel decision, which held in  
favor of the Petitioners, is reported at 498 F.2d 248. Copies  
of both opinions are appended to this Petition.

## JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 1976. This Petition was timely filed. The jurisdiction of this Court is based upon Title 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED FOR REVIEW

### I

DOES THE INFLICTION OF SEVERE CORPORAL PUNISHMENT UPON PUBLIC SCHOOL STUDENTS, ABSENT NOTICE OF THE CHARGES FOR WHICH PUNISHMENT IS TO BE INFLICTED AND AN OPPORTUNITY TO BE HEARD, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

### II

DOES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT APPLY TO THE ADMINISTRATION OF DISCIPLINE THROUGH SEVERE CORPORAL PUNISHMENT INFLICTED BY PUBLIC SCHOOL TEACHERS AND ADMINISTRATORS UPON PUBLIC SCHOOL CHILDREN?

### III

IS THE INFLICTION OF SEVERE CORPORAL PUNISHMENT UPON PUBLIC SCHOOL STUDENTS ARBITRARY, CAPRICIOUS AND UNRELATED TO ACHIEVING ANY LEGITIMATE EDUCATIONAL PURPOSE AND THEREFORE VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

## CONSTITUTIONAL PROVISIONS INVOLVED

### AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

### AMENDMENT XIV

...nor shall any state deprive any person of life, liberty or property without due process of law; ....

## STATEMENT OF THE CASE

On January 7, 1971, the petitioners filed a three count complaint in the United States District Court for the Southern District of Florida seeking compensatory and punitive damages for personal injuries resulting from corporal punishment administered to them by certain Dade County, Florida public school teachers and administrators. The complaint alleged violations of Title 42 U.S.C. §§1981-1988 and jurisdiction was based upon Title 28 U.S.C. §§1331 and 1343. Count three of the complaint sought declaratory and injunctive relief against the use of corporal punishment in Dade County public schools. All of the federal claims were based upon the alleged denial of Eighth and Fourteenth Amendment rights arising from the infliction of corporal punishment.

The claim for declaratory and injunctive relief was heard in a week long trial before the district court. At the close of the plaintiffs' evidence, which consisted of sixteen students, several parents and relatives of students, an educational psychology professor and a number of school teachers and administrators, in addition to substantial documentary evidence, the defendants successfully moved for dismissal under the pertinent portion of Rule 41(b), Federal Rules of Civil Procedure.<sup>1/</sup>

<sup>1/</sup>

That Section provides: "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

The original panel decision, 498 F.2d at 251

summarizes what transpired next:

The district court noted in its order that counsel for the parties then agreed that the evidence offered to support Count Three "would also be considered by the Court, as if upon motion for directed verdict, as having been offered on Counts One and Two, provided that certain additional testimony desired by Plaintiffs' counsel were placed in the record by deposition or stipulation." Thus, this case really involves one equity case, styled Counts One and Two. The additional testimony was summarized in a stipulation. On February 23, 1973, the district court first dismissed Count Three of the complaint, and then concluded that a jury could not lawfully find that either of the plaintiffs in Counts One and Two sustained a deprivation of constitutional rights.

An appeal was taken to the Fifth Circuit from the order of dismissal.

That appeal resulted in the original panel decision, 498 F.2d 248, which held that the Eighth Amendment's prohibition against cruel and unusual punishment applied to the paddling practiced by the defendants Wright, Deliford and Barnes at Drew Junior High School. The Court also held that those practices violated both procedural and substantive due process. 498 F.2d at 269.

The panel took nearly five pages of its opinion to detail the undisputed facts upon which its conclusions were based. 498 F.2d 255-259. Some examples are set forth below:

On October 6, 1970, a number of students including fourteen year old James Ingraham, a named plaintiff, were slow in leaving the stage of the school auditorium

when asked to do so by a teacher. A number of boys and girls involved in this incident were taken to the principal's office and paddled. James protested, claiming he was innocent, and refused to be paddled. Willie J. Wright, I, the principal called for the assistance of Lemmie Deliford, the assistant principal in charge of administration, and Solomon Barnes, an assistant to the principal. Barnes and Deliford held James by his arms and legs and placed him, struggling, face down across a table. Wright administered at least twenty licks. After the paddling, Wright told James to wait outside his office -- 'he said if I move he was going to bust me on the side of my head' -- but James went home anyway.

498 F.2d at 255-256 (footnote omitted).

Young Ingraham required repeated medical treatment as a result of the injuries. Eight days after the paddling a doctor advised 72 hours of rest at home. It was three weeks before Ingraham could comfortably sit again. 498 F.2d at 256.

Roosevelt Andrews testified that defendant Barnes, angry at him for a comment:

"pushed me against the urinate thing, the bowl, and then he snatched me around to it and that's when he hit me first. He first hit me on the back-sides and then I stand up and he pushed me against the bathroom wall, then things-- that part the bathroom, the wall \* \* \* Between the toilets, he pushed me against that and then he snatched me from the back there and that's when he hit me on my leg, then hit me on my arm, my back and then right across my neck, in the back here."

(Tr. 295.) Incensed over his treatment, Roosevelt complained to Wright, but Wright seemed to support Barnes, his co-administrator.

498 F.2d at 257.



On another occasion Andrews required medical treatment and lost the use of his arm for a week when paddled and hit on the wrist by Wright. 498 F.2d at 257.

A third boy's testimony was described this way:

Daniel Lee, who was paddled lots of times (Tr. 463) at Drew, described how on one occasion Barnes had a number of students in a line, holding onto the chair, already paddling them, and asked him to come over and 'get a little piece of the board.' (Tr. 480-481.) Daniel asked what he had done, and Barnes allegedly grabbed him and tried to throw him on the chair. In the ensuing confusion, Barnes hit Daniel on the hand four or five times. The hand swelled and hurt and the bone was--it seems like the bone was going to come out (Tr. 481), so Daniel's mother took him to the hospital for an X-ray. According to Daniel, a bone in his right hand was fractured. The Court, observing Daniel's hand, stated that 'It seems to me to be disfigured, a portion of his right knuckle is enlarged to some degree.' Daniel claimed that his hand still hurt, and swelled if he tried to use it.

498 F.2d at 257-258.

Not only was paddling a daily event 498 F.2d at 257, but the assistant principals, Deliford and Barnes, were seen carrying brass knuckles. 498 F.2d 257, n. 16.

A complete view of the reign of terror which existed at Drew Junior High School can only be gleaned from the panel description at 255-259.

Finding that the plaintiffs' evidence entitled them to a full trial, the panel reversed the district court's order of dismissal. 498 F.2d 265-266.

Thereafter, the defendants were successful in obtaining an en banc rehearing of the original panel decision. On rehearing, the full Fifth Circuit reversed the panel decision and held, 10-5, that the cruel and unusual punishment clause of the Eighth Amendment had no application to public school discipline whether or not that discipline was "excessively administered." 525 F.2d at 915. The Court also concluded that "procedural safeguards accompanying the use of corporal punishment in public schools are not constitutionally mandated" 525 F.2d at 918, and corporal punishment, having a "real and substantial relation to the object sought to be attained [discipline]", substantive due process was not offended. 525 F.2d at 916-917. The district court's dismissal of the complaint was affirmed.

This Petition for Writ of Certiorari seeks review of that decision.

#### REASONS FOR GRANTING THE WRIT

1. The Decision Below Presents Important Constitutional Questions Which Have Not Been, But Should Be, Resolved by this Court.

#### A. The Procedural Due Process Issue.

This Court has held that an Ohio Statute which authorized suspension of public school students for up to ten days without notice of their alleged offenses and an opportunity to be heard violated the students' right to procedural due process under the Fourteenth Amendment. Goss v. Lopez, 419 U.S. 565 (1975). The Court found that the students had a substantial property right to their education and that the right could not be withdrawn, even temporarily, absent minimal due

process protections. However, the Court has not decided if public school students, faced with a deprivation of substantial rights to liberty - the rights to be free from severe physical and emotional punishment - must also be accorded due process protections.

In Baker v. Owen, \_\_\_ U.S. \_\_\_, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975) the Court's summary affirmance without opinion was limited to that portion of the lower court's judgment which held that the North Carolina Statute permitting reasonable corporal punishment of public school students over parental objection was valid.<sup>2/</sup> The issues of procedural due process, which the three-judge court resolved in favor of the students, Baker v. Owen, 395 F.Supp. 294 (M.D. N.C. 1975), were not before this Court. Therefore the important constitutional question of what process is due a public school student upon whom severe corporal punishment is inflicted has not been decided by the Court. This case presents that issue.

B. The Cruel and Unusual Punishment Issue.

The Court has not decided if the Eighth Amendment's prohibition against cruel and unusual punishment applies to the

<sup>2/</sup>

The question presented by the plaintiffs' appeal was:

Does constitutional concept of familial privacy bar school officials from whipping school children over parental objection?

Baker v. Owen, No. 75-279, 44 L.W. 3142.

infliction of discipline to public school children through severe corporal punishment. The lower court in Baker v. Owen did not reach the cruel and unusual issue, saying:

In short, this record does not begin to present a picture of punishment comparable to that in Ingraham v. Wright, 498 F.2d 248] at 255-259, or in Nelson v. Hyne, 491 F.2d 352 (7th Cir. 1974), which we believe indicate the kinds of beatings that could constitute cruel and unusual punishment if the eighth amendment is indeed applicable.

395 F.Supp. at 303.

Thus, this Court's summary affirmance cannot be interpreted as a resolution of whether or not the Eighth Amendment has application in a public school setting. The en banc Fifth Circuit decision in Ingraham squarely held that it did not. That important constitutional matter should now be decided by this Court.

2. The Decision Below Conflicts With  
The Decisions Of Other Courts Of  
Appeals And Federal District Courts.

A. The Cruel and Unusual Punishment Issue.

The en banc Fifth Circuit decision in this case squarely conflicts with the Eighth Circuit decision in Bramlett v. Wilson, 495 F.2d 714 (8th Cir. 1974). Bramlett concluded that the Eighth Amendment does apply to excessive corporal punishment in public schools. The Court below held that it did not apply to any corporal punishment in public schools, excessive or not.

A conflict is also presented with the Seventh Circuit decision in Nelson v. Hyne, 491 F.2d 352 (7th Cir. 1974), cert. denied, 417 U.S. 976 (1974). Nelson involved corporal punishment used in a state correctional school, one-third of whose students were "non-criminal offenders." 491 F.2d at 353. Drawing



no distinction between the criminal and non-criminal residents of the school, the Nelson court applied the Eighth Amendment to the school's practice of paddling its students. 491 F.2d at 354-355.<sup>3/</sup>

There have also been several federal court decisions which assume, without deciding, that the Eighth Amendment applies to the imposition of corporal punishment in public schools. Baker v. Owen, 395 F.Supp. 294 (M.D. N.C. 1975), aff'd \_\_\_ U.S. \_\_\_, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975); Glaser v. Marietta, 351 F.Supp. 555 (W.D. Pa. 1972); Ware v. Estes, 328 F.Supp. 657 (N.D. Tex. 1971), aff'd per curiam, 458 F.2d 1360 (5th Cir. 1972); Whatley v. Pike County Board of Education, Civil Action No. 977 (N.D. Ga. 1971) (three-judge court); and Sims v. Board of Education, 329 F.Supp. 678 (D. N.M. 1971).

Finally, two district courts have held that the Eighth Amendment does not apply to corporal punishment in public schools. Sims v. Waln, 388 F.Supp. 543 (S.D. Ohio 1974) and Gonyaw v. Gray, 361 F.Supp. 366 (D. Vt. 1973).

The varying opinions of numerous federal courts (and judges) buttress the argument that this Court should grant certiorari to resolve the ongoing conflict over the place of the Eighth Amendment in public schools.

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<sup>3/</sup> We recognize that if an Eighth Amendment distinction can be made between discipline in public schools and correctional facilities, Nelson is not a direct conflict with the en banc decision here. The en banc majority did subscribe to that distinction. 525 F.2d at 914-915. We believe the distinction to be invalid.

## B. The Procedural Due Process Issue.

The decision below is in plain conflict with the three-judge court decision in Baker v. Owen, 395 F.Supp. at 301-303, which makes minimum procedural due process safeguards the sine qua non for imposing mild corporal punishment. The Baker court reached that ruling by looking to Goss v. Lopez, 419 U.S. 565 (1975). The court below found Goss unpersuasive. Therefore we turn to the third reason why certiorari should be granted, the conflict between the en banc holding and the decisions of this Court in Goss and other cases.

### 3. The Decision Below Conflicts With The Decisions of This Court.

#### A. The Procedural Due Process Issue.

The defendants in this case conceded that "corporal punishment in the public schools of Dade County, Florida, is a last resort means of discipline as an alternative to suspension or expulsion.... Defendants' Brief, p. 17, 498 F.2d at 267; 525 F.2d at 925. They placed the loss of liberty attendant to corporal punishment above the loss of property inherent in temporary suspensions from school. On that point the defendants were correct. The words of the due process clause, protecting "life, liberty, or property" denote the views of the founding fathers on the hierarchy of rights entitled to constitutional protection. Goss v. Lopez, 419 U.S. 565 (1975) protected the property right of an education from temporary loss unless minimal due process procedures were present. The court below did not believe that severe corporal punishment triggered the right to procedural due process. 525 F.2d at 917. Implicit in Goss must be the concept that liberty - freedom from severe physical punishment at



the hands of the state - requires due process safeguards. The denial of that concept by the en banc court thus conflicts with Goss.

It also conflicts with portions of Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) and Board of Regents v. Roth, 408 U.S. 564, 558 (1972), cited with approval in Goss, 419 U.S. at 574-575. Those cases mandated that "where a person's good name, reputation, honor or integrity is at stake because of what the Government is doing to him," notice and an opportunity to be heard are essential. The decision below simply asserted that a paddling "is certainly a much less serious event in the life of a child than is a suspension or expulsion." 525 F.2d at 919 (footnote omitted). Certainly the plaintiffs, who sought judicial relief for the beatings inflicted upon them, did not agree. But it is for this court to decide if the stigma and pain of corporal punishment is due fewer safeguards than being posted as an excessive drinker. Cf. Wisconsin v. Constantineau, 400 U.S. 433 (1971). The conflict is apparent and should be resolved.

B. The Substantive Due Process Issue.

This Court has held that where state action invades fundamental liberties it will be subjected to "strict scrutiny" by the courts, Skinner v. Oklahoma, 316 U.S. 535, 541 (1941), and will not be upheld simply on the showing that the statute has some rational relationship to the proper state purpose. Griswold v. Connecticut, 381 U.S. 479, 497 (Goldberg, J., concurring) (1965). The State may prevail only upon showing a compelling, subordinating interest, Bates v. City of Little Rock, 361 U.S. 516, 524 (1960). Moreover, governmental action which broadly invades areas of constitutionally protected rights "must be viewed in the light of less drastic means for achieving the same basic

purpose", Shelton v. Tucker, 364 U.S. 479, 488 (1960) (footnote omitted).

Of course, none of those cases, which forge the concept of "substantive due process", relate to the precise issue presented by this case. But inherent in those decisions is the belief that governmental actions must not be arbitrary and unsuited to their purpose. To the extent that the court below held that no matter how severe or excessive, corporal punishment is not arbitrary and is always suited to its purpose, the decision conflicts with a long line of constitutional theory explicated by this Court.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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firm which disenfranchise a minority that fails to register. What we have held is that the tactic underlying the Texas annual voter registration system, which sought to win the war for representative government by inflicting devastating losses on its electoral army before it ever marched off to the polls, is inconsistent with the United States Constitution. The mass disenfranchisement may have been unintentional, but it was nevertheless the consequence of the law. The judgment of the District Court declaring unconstitutional the statutory provisions prescribing limited registration time periods and the requirement for annual voter registration was correct. The effect of this is to leave intact the 1971 amendments. See notes 6 and 7, *supra*.

Affirmed.



Eloise INGRAHAM, as next friend,  
etc., et al., Plaintiffs-Appellants,

v.

Willie J. WRIGHT, I, Individually, etc.,  
et al., Defendants-Appellees.

No. 73-2078.

United States Court of Appeals,  
Fifth Circuit.  
July 29, 1974.

Action was brought by parents seeking compensatory and punitive damages and declaratory and injunctive relief as to use of corporal punishment in county school system. The United States District Court for the Southern District of Florida, Joe Eaton, J., dismissed the action, and plaintiffs appealed. The Court of Appeals, Rives, Circuit Judge, held that three-judge court was not required, that superintendent of schools sued in his individual capacity was a "person" within the Civil

Rights Act, and that evidence established that use of corporal punishment at one school violated prohibition against cruel and unusual punishment and due process.

Reversed and remanded.

Lewis R. Morgan, Circuit Judge,  
filed dissenting opinion.

#### 1. Civil Rights $\S$ 13.7

School superintendent, sued as individual, is a "person" within meaning of Civil Rights Act. 42 U.S.C.A.  $\S$  1983.

#### 2. Civil Rights $\S$ 13.11

If plaintiffs in civil rights action seeking injunctive and declaratory relief against use of corporal punishment in county school system request to add individual members of school board as parties defendant, such request should be granted. 42 U.S.C.A.  $\S$  1983; Fed. Rules Civ.Proc. rule 21, 28 U.S.C.A.

#### 3. Courts $\S$ 405(2)

Even though parties to appeal did not raise issue, Court of Appeals would consider whether complaint seeking declaratory and injunctive relief relating to use of corporal punishment in county school system should have been heard by three-judge court. 28 U.S.C.A.  $\S$  2281; 42 U.S.C.A.  $\S$  1983; West's F.S.A.  $\S$  232.27.

#### 4. Courts $\S$ 101.5(2)

Consent, either implied or express, cannot authorize single judge to hear case that falls within statute relating to impaneling three-judge court to hear case seeking injunction against enforcement of state law. 28 U.S.C.A.  $\S$  2281.

#### 5. Courts $\S$ 101.5(2)

Where plaintiffs in civil rights action seeking declaratory and injunctive relief as to use of corporal punishment in county school system did not seek to enjoin enforcement of any specific state statute but merely sought to enjoin use of corporal punishment on students in particular county, case was not required to be heard by three-judge court. 28 U.S.C.A.  $\S$  2281; 42 U.S.C.A.  $\S$  1983; West's F.S.A.  $\S$  232.27.

## A P P E N D I X

**6. Constitutional Law** ¶270

Eighth Amendment prohibition against cruel and unusual punishment is applicable to states through due process clause of Fourteenth Amendment. U.S.C.A.Const. Amends. 8, 14.

**7. Criminal Law** ¶1213

Punishments devised by school officials are subject to Eighth Amendment scrutiny. U.S.C.A.Const. Amend. 8.

**8. Criminal Law** ¶1213

At present time, corporal punishment per se cannot be ruled violative of Eighth Amendment. U.S.C.A.Const. Amend. 8.

**9. Criminal Law** ¶1213

Scope of Eighth Amendment is not static and must draw its meaning from evolving standards of decency. U.S.C.A.Const. Amend. 8.

**10. Criminal Law** ¶1213

Specific policies on corporal punishment promulgated by county school board did not violate Eighth Amendment. U.S.C.A.Const. Amend. 8.

**11. Schools and School Districts** ¶176

While evidence was insufficient to establish that actual practice of corporal punishment in county school system as a whole violated the Eighth Amendment, evidence as to pattern, practice and uses of corporal punishment at one junior high school was such that dismissal of suit seeking compensatory and punitive damages and declaratory and injunctive relief was error. 42 U.S.C.A. §§ 1981-1988, 1983; U.S.C.A.Const. Amend. 8; Fed.Rules Civ.Proc. rule 41(b), 28 U.S.C.A.; West's F.S.A. § 232.27.

**12. Criminal Law** ¶1213

Violation of Eighth Amendment can occur at level of single educational institution even though there may be no violation at other institutions in same district. U.S.C.A.Const. Amend. 8.

**13. Civil Rights** ¶13.13(3)

Evidence, in suit seeking damages and injunctive and declaratory relief as to use of corporal punishment in county school system, established that punishment meted out at particular school was

of nature likely to cause serious physical and psychological damages and was sometimes arbitrary. 42 U.S.C.A. § 1983.

**14. Criminal Law** ¶1213

Whether punishment is cruel and unusual in constitutional sense depends to significant degree on circumstances surrounding particular punishment. U.S.C.A.Const. Amend. 8.

**15. Civil Rights** ¶13.4(6)

Specific intent to deprive person of his constitutional rights is not necessary to maintain civil rights action. 42 U.S.C.A. § 1983.

**16. Federal Civil Procedure** ¶2061, 2071

Where suit contained three counts with counts one and two seeking compensatory and punitive damages and equity count three seeking declaratory and injunctive relief as to use of corporal punishment in county school system, and counts seeking compensatory and punitive damages continued to be for jury trial, issues of fact common to all three counts must first be heard and determined by jury's verdict rendered on one or both of first or second count.

**17. Criminal Law** ¶1213

There is some question as to whether Eighth Amendment extends to include negligence. U.S.C.A.Const. Amend. 8.

**18. Schools and School Districts** ¶176

Full panoply of procedures associated with judicial process are not required in determining whether school officials may administer corporal punishment. U.S.C.A.Const. Amend. 14.

**19. Schools and School Districts** ¶176

If student concedes that he has engaged in certain conduct, but claims that he did not know that such conduct was prohibited, school authorities should proceed with caution in administering corporal punishment.

**20. Schools and School Districts** ¶175

Punishment of any sort would be patently unfair where student was generally unaware of school regulation, and had no reason to know that he was engaging in conduct which might later be used as basis for punishment.

**21. Schools and School Districts** ¶175

If student claims that he is innocent of conduct which merits punishment, school officials should make sufficient inquiries to ensure that, to contrary, student is guilty beyond any reasonable doubt.

**22. Schools and School Districts** ¶175

Where student claims that he is innocent of conduct which merits punishment, student should be allowed to respond to witnesses against him, and in some cases should be accorded opportunity to ask them relevant questions.

**23. Schools and School Districts** ¶175

Hearing as to whether student has in fact been guilty of conduct meriting punishment may take place in informal setting and no formal rules of procedure or evidence need be followed.

**24. Schools and School Districts** ¶176

School district policy for imposing corporal punishment comported with required procedures.

**25. Schools and School Districts** ¶176

Under the evidence, court could not say that mild or moderate corporal punishment was unrelated to achievement of any legitimate educational purpose.

**26. Constitutional Law** ¶253(2)**Criminal Law** ¶1213

Record established that corporal punishment meted out at one school of school district violated constitutional prohibition against cruel and unusual punishment and due process. U.S.C.A. Const. Amends. 8, 14.

**27. Courts** ¶405(16.16)

In absence of findings as to extent to which corporal punishment is useful or necessary disciplinary measure in county school system, reviewing court would not consider claim by parents that corporal punishment was inflicted notwithstanding their instructions to contrary.

Alfred Feinberg, Miami, Fla., for plaintiffs-appellants.

Frank A. Howard, Jr., Thomas G. Spicer, Leland E. Stansell, Jr., James A. Smith, Miami, Fla., for defendants-appellees.

Before RIVES, WISDOM and MORGAN, Circuit Judges.

RIVES, Senior Circuit Judge:

More than a century ago, a member of the Supreme Court of Indiana made the following observation:

"The husband can no longer moderately chastise his wife; nor, according to the more recent authorities, the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the schoolboy, 'with his shining morning face,' should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained."

Cooper v. McJunkin, 1853 (4 Ind. (Porter) 290 (Stuart, J.)). In the present case, we consider constitutional issues related to corporal punishment in the public school system of Dade County, Florida.

Plaintiffs filed on January 7, 1971, a complaint containing three counts. Counts One and Two were individual actions for compensatory and punitive damages brought by two junior high school students under 42 U.S.C. §§ 1981-1988, with jurisdiction claimed under 28 U.S.C. § 1331 and § 1343. The students claimed personal injuries resulting from corporal punishment administered by certain defendants in alleged violation of their constitutional rights. Count Three of the complaint was a class action, also brought under 42 U.S.C. §§ 1981-1988, with jurisdiction claimed under 28 U.S.C. § 1331 and § 1343. This class action filed on behalf of all students in the public school system of Dade County sought injunctive and declaratory relief against the use of corporal punishment throughout the county school system.

The plaintiffs presented their evidence on Count Three of the complaint



in a week-long trial before the district court without a jury. Those who testified included sixteen students or former students, several parents and other relatives of students, a professor of educational psychology, and a number of school teachers and administrators, including the defendant Superintendent Edward Whigham. The evidence also included a photograph, stipulations, answers to interrogatories, school records and medical reports. At the close of the plaintiffs' case, the defendants moved for dismissal under Rule 41(b), F.R. Civ.P., which in relevant part provides:

"After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits."

The district court noted in its order that counsel for the parties then agreed that the evidence offered to support Count Three "would also be considered by the Court, as if upon motion for directed verdict, as having been offered on Counts One and Two, provided that cer-

tain additional testimony desired by Plaintiffs' counsel were placed in the record by deposition or stipulation." Thus, this case really involves one equity case, styled Count Three, and two law cases, styled Counts One and Two. The additional testimony was summarized in a stipulation. On February 23, 1973, the district court first dismissed Count Three of the complaint, and then concluded that a jury could not lawfully find that either of the plaintiffs in Counts One and Two sustained a deprivation of constitutional rights.

We hold that the district court erred in dismissing each of the three counts of plaintiffs' complaint, and, therefore, reverse and remand for further proceedings.

### I.

#### JURISDICTIONAL ISSUES

A. Defendants assert that there is no federal jurisdiction over Count Three under 42 U.S.C. §§ 1981-1988 and 28 U.S.C. § 1331 and § 1343, because the Dade County School Board and the Superintendent of Schools in their official capacities are not "persons" amenable to civil rights actions. In support of this claim defendants cite *City of Kenosha v. Bruno*, 1973, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109. In *City of Kenosha*, the Supreme Court held that two municipalities in Wisconsin were not "persons" within the meaning of 42 U.S.C. § 1983. In *Campbell v. Masur*, 5 Cir. 1973, 486 F.2d 554, where a plaintiff sued a school superintendent and a school board in their official capacities only, the court sent the case back to the district court for re-examination and further consideration in light of *City of Kenosha*.<sup>1</sup>

[1] Plaintiffs have sued Superintendent of Schools Edward L. Whigham in his individual capacity, as well as in his official capacity.<sup>2</sup> It is clear that

the school superintendent, sued as an individual, is a "person" within the meaning of § 1983. *Sterzing v. Fort Bend Independent School District*, 5 Cir. 1974, 496 F.2d 92, p. 93, n. 2; *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 5 Cir. 1974, 493 F.2d 799. To hold otherwise would suggest the impossibility of suing any government official or employee under § 1983. *City of Kenosha, supra*, does not require or even intimate the possibility of such a result. The right to bring a § 1983 action against a state or local official is well established. See *Monroe v. Pape*, 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, and its progeny. Also see *Moor v. County of Alameda*, 1973, 411 U.S. 693, 700, 93 S.Ct. 1785, 36 L.Ed.2d 596.

[2] Prior to the decision in *City of Kenosha*, a number of courts had held that cities were proper defendants under § 1983 where equitable relief was sought. See discussion in *City of Kenosha v. Bruno, supra*, 412 U.S. at 512-514, and at 516ff, 93 S.Ct. 2222 (Douglas, J., dissenting in part). The complaint in the present case, and all of the proceedings in the district court, occurred before *City of Kenosha* was decided. Taking these factors into consideration, the district court should on remand grant the likely request of plaintiffs to add the individual members of the Dade County School Board as parties defendant under Count Three of the complaint. Without regard to whether the plaintiffs may ultimately be entitled to any equitable relief against the School Board or its members, fairness and efficient judicial administration justify the addition of the individual school board members as parties insofar as the plaintiffs seek declaratory and equitable relief restraining the School Board from

authorizing or implementing corporal punishment in Dade County. See Rule 21, F.R.Civ.P.; *Mullaney v. Anderson*, 1952, 342 U.S. 415, 72 S.Ct. 428, 96 L.Ed. 458; *United States v. Louisiana*, 1957, 354 U.S. 515, 77 S.Ct. 1373, 1 L.Ed.2d 1525; *Halladay v. Verschoor*, 8 Cir. 1967, 381 F.2d 100; *Rakes v. Coleman*, E.D.Va.1970, 318 F.Supp. 181; 3A Moore § 31.05[1].

[3-5] B. Although not argued by the parties on this appeal, it is appropriate to examine whether Count Three of the instant case should have been heard by a three-judge district court.<sup>3</sup> Though neither party requested a three-judge district court, consent, either implied or express, cannot authorize a single judge to hear a case that falls within the terms of 28 U.S.C. § 2281. *Sands v. Wainwright*, 5 Cir. 1973, 491 F.2d 417, 424 (en banc); *Borden Co. v. Liddy*, 8 Cir. 1962, 309 F.2d 871; *Americans United for Sep. of Church & State v. Paire*, 1 Cir. 1973, 475 F.2d 462. The district court in the present case considered the question and ruled that a three-judge district court was not required. We agree.

Plaintiffs sought injunctive relief restraining the defendants, their agents and employees from inflicting any form of corporal punishment upon students in the Dade County public school system.<sup>4</sup> Plaintiffs did not request an injunction restraining the enforcement of any specific Florida statute, and in oral argument before this Court, counsel for plaintiffs stated, "We are not challenging the constitutionality of the Florida statute." Section 232.27 of Florida Statutes Annotated, provides:

"Each teacher or other member of the staff of any school shall assume such authority for the control of the

1. Also see *Cherame v. Tucker*, 5 Cir. 1974, 493 F.2d 596, 597, where this Court held that various arms of the state government of Louisiana, such as the Department of Highways, are not persons within the meaning of 42 U.S.C. § 1983.

2. Willie J. Wright, 1 (a principal), Lemmie Deliford (an assistant principal) and Solomon Barnes (an assistant to a principal) have each also been sued in his official and individual capacity.

3. Counts One and Two, which are individual actions for damages, clearly do not require a three-judge district court. Therefore, if it were determined that a three-judge court is necessary to decide Count Three, we would still be obliged to consider most or all of the underlying facts in this case in order to review the district court's disposition of Counts One and Two.

4. Plaintiffs' request for injunctive relief restraining the defendants from administering corporal punishment in Charles R. Drew Junior High School is obviously included within the larger request for injunctive relief throughout the entire county system.

pupils as may be assigned to him by the principal and shall keep good order in the classroom and in other places in which he is assigned to be in charge of pupils, but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unduly severe in its nature."

The injunctive relief sought by plaintiffs would not conflict with this provision, and would not extend beyond Dade County. By establishing limits upon the administration of corporal punishment, the statute inferentially permits local school boards to authorize such punishment. This statute does not mandate or require corporal punishment, however, nor does it compel local school boards to adopt regulations providing for corporal punishment. In fact, the statute would not prevent a local board from prohibiting corporal punishment in certain grade levels or throughout a county system.

The Dade County School Board adopted a policy which affirmatively authorized the use of corporal punishment in Dade County schools. It is the implementation of this policy, and the practices which have developed in Dade County under the authority of this policy, particularly in one junior high school, which the plaintiffs seek to enjoin. Although a regulation authorizing corporal punishment is consistent with F.S. 232.27, F.S.A. an injunction restraining the named defendants, their agents and employees from the use of corporal punishment would not require the invalidation of the Florida statute, and would not directly affect any county in Florida other than Dade County. Count Three, therefore, comes within the rule that where a challenged regulation or policy is of only local import, a single judge must hear the case. *Board of Regents of University of Texas System v. New Left Education Project*, 1972, 404 U.S. 541, 92 S.Ct. 652, 30 L.Ed.2d 697; *Moody v. Flowers*, 1967, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643;

*Griffin v. School Board of Prince Edward County*, 1964, 377 U.S. 218, 327, 328, 84 S.Ct. 1226, 12 L.Ed.2d 256; *Rorick v. Board of Commissioners*, 1939, 307 U.S. 208, 59 S.Ct. 808, 83 L.Ed. 1242; *Ex parte Public National Bank*, 1928, 278 U.S. 101, 49 S.Ct. 43, 73 L.Ed. 202; *Ex parte Collins*, 1928, 277 U.S. 565, 48 S.Ct. 585, 72 L.Ed. 990; *Sands v. Wainwright*, 5 Cir. 1973, 491 F.2d 417 (en banc).

## II.

### THE FACTS

As to the district court's findings or treatment of facts, appellate review is governed by one rule applicable to Count Three and by a different rule applicable to Counts One and Two. We have heretofore indicated that there were two separate orders of dismissal. Count Three was dismissed under Rule 41(b), F.R. Civ.P. "on the ground that upon the facts and the law the plaintiff has shown no right to relief." As authorized by that rule, the district court in effect rendered judgment on the merits against the plaintiffs and made findings as provided in Rule 52(a). See *Emerson Electric Co. v. Farmer*, 5 Cir. 1970, 427 F.2d 1082, 1086; *Wright & Miller*, Federal Practice & Procedure § 2371; *Moore's Federal Practice* ¶ 41.13[4]. The district court's order of dismissal as to Counts One and Two correctly recognized that, "The issue now before the Court is whether the evidence, viewed most favorably to plaintiffs is sufficient to permit a jury to return a verdict for plaintiffs on either or both of the First and Second Counts." On that issue, our review of the sufficiency of the evidence is governed by the familiar rule enunciated in *Boeing Company v. Shipman*, 5 Cir. 1969, 411 F.2d 365, 374-375.

In its order of dismissal as to Count Three, the district court listed its "Findings of Fact" as follows:

"1. The Dade County public school system is the sixth largest in the nation, with approximately 12,500 teachers and administrative personnel oper-

ating 237 schools with a total student population in excess of 242,000.

"2. Corporal punishment is one of a variety of measures employed in the school system for the correction of pupil behavior and the preservation of order. Other alternative measures in use range from parent and student conferences, the use of guidance counselors and psychologists, where available, to suspension and expulsion. Corporal punishment is not utilized at all in sixteen schools in Dade County.

"3. Statutory authority for the use of corporal punishment in Florida is found in Florida Statutes, § 232.27, which deals with the duties of teachers in the control of pupils, but provides that a teacher " \* \* \* shall not inflict corporal punishment before consulting the principal or teacher in charge of the school \* \* \*." The Defendant School Board's policy as it existed when this suit was filed is more restrictive. It requires the principal to determine the necessity for corporal punishment, and to designate the time, place and person to administer the punishment, and in other ways limits the circumstances in which the punishment may be used. The policy was revised in November, 1971, and supplemented with detailed regulations, which prescribe additional limitations upon the nature, extent and circumstances of permissible punishment.

"4. There is no published schedule of infractions for which corporal pun-

5. During the 1970-71 school year, Policy 5144 provided in relevant part as follows:

"II. Punishment: Corporal Punishment "Punishment in the general sense is the inflicting of a penalty for an offense. Corporal punishment is generally applied to the body of the offender or is physical punishment as opposed to other forms of punishment and is administered as a means of changing the behavior of the student. Therefore, it is important to analyze whether or not this goal will be accomplished by such action.

"Corporal punishment may be used in the case where other means of seeking cooperation from the student have failed. If

ishment is authorized, nor any formal procedural requirements which must be observed before punishment may be administered.

"5. There has been a rather widespread failure to adhere to School Board policy regarding corporal punishment. Teachers have punished students without first consulting with their respective principals. More blows have been administered to students than authorized by the policy. Teachers have administered corporal punishment with only the student or students present. With the exception of a few cases, the punishments administered have been unremarkable in physical severity.

"The instances of punishment which could be characterized as severe, accepting the students' testimony as credible, took place in one junior high school."

We agree with and accept the expressed findings of the district court. However, those findings are somewhat meager considering the voluminous evidence presented in this case, and it is therefore appropriate for us to detail more fully what the testimony and other evidence reveals.

Dade County School Board Policy 5144 expressly authorizes the use of corporal punishment, and prescribes the procedures to be followed where a teacher feels that corporal punishment is necessary.<sup>5</sup> During the 1970-71 school

it appears that corporal punishment is likely to become necessary, the teacher must confer with the principal. The principal will determine the necessity for corporal punishment and designate the time, place, and the person to administer said punishment. In any case, the student should understand clearly the seriousness of the offense and the reason for the punishment. Care should be taken that the period of time between the offense and the punishment is not so long as to cause undue anxiety in the pupil. The punishment must be administered in kindness and in the presence of another adult at a time and under conditions not calculated



year, Policy 5144 provided, among other things, that the punishment be administered "in kindness and in the presence of another adult" and that "no instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck."

The evidence shows that corporal punishment in Dade County during the relevant period consisted primarily, if not entirely, of "paddling."<sup>6</sup> Paddling involves striking the student with a flat wooden instrument<sup>7</sup> usually on the buttocks. The district court recognized that the evidence revealed "a rather widespread failure to adhere to School Board policy regarding corporal punishment." Many of the student witnesses gave testimony which indicated that their teachers in various schools did not always consult with the principal of the school before administering corporal punishment. A number of non-principals admitted in their answers to interrogations that they did not "regularly and routinely" confer with the principal before paddling students.<sup>8</sup> Student testimony also indicated, and the district

to hold the student up to ridicule or shame.

"In the administering of corporal punishment, no instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck. The person administering the corporal punishment must realize his own personal liabilities if the student being given corporal punishment is physically injured.

"Corporal punishment should never be administered to a student whom school personnel know to be under psychological or medical treatment unless there has been a pre-conference with the school psychologist or the physician."

On November 3, 1971, almost ten months after this action was filed, Policy 5144 was extensively revised. As indicated by the district court, this revision included "detailed regulations, which prescribe additional limitations upon the nature, extent and circumstances of permissible punishment."

6. We recognize that the term "paddling" is a word of art. Plaintiffs in their brief refer to "beating." Similarly, the punishment is described in terms of "licks" and "blows,"

court found, that teachers sometimes administered corporal punishment with only the student or students present, whereas school board policy required the presence of another adult during the administration of corporal punishment.

In at least 16 of the 231 Dade County schools, corporal punishment was not utilized in the 1970-71 school year.<sup>9</sup> The evidence suggests that in most of those schools which did use corporal punishment, the punishment was normally limited to one or two licks, or sometimes as many as five, with no apparent physical injury to the children who were punished. Quoting from the district court's findings of fact, "The instances of punishment which could be characterized as severe \* \* \* took place in one junior high school." This school was Charles R. Drew Junior High School, and the occurrences there merit description.

The experiences of individual students at Drew reveal the nature of the system of corporal punishment utilized at this educational institution. On October 6, 1970, a number of students, including

and the instruments of punishment are referred to as "paddles" and "boards."

7. Paddle size was not prescribed during 1970-71. Most paddles probably were within the range indicated by the November 3, 1971 revision of Policy 5144: "The instrument must be of wood and be no more than two feet long nor more than one-half inch thick and no more than four inches wide."

8. By stipulation dated October 10, 1971, the parties agreed that, "The total number of persons with the Dade County School System, other than school principals, who administered corporal punishment but did not regularly and routinely confer with the principal of the school in which they were employed during the school year commencing September 1970 was 59 (fifty-nine) prior to each paddling." (R. 1435) This stipulation was based on questionnaires prepared by the plaintiffs and completed by school officials and employees.

9. At least 10 of these schools did not administer corporal punishment as a matter of school policy. See stipulation of October 10, 1972. Also see district court finding 2.

fourteen-year-old James Ingraham, a named plaintiff, were slow in leaving the stage of the school auditorium when asked to do so by a teacher. A number of boys and girls involved in this incident were taken to the principal's office and paddled. James protested, claiming he was innocent, and refused to be paddled. Willie J. Wright, I, the principal called for the assistance of Lemmie Deliford, the assistant principal in charge of administration, and Solomon Barnes, an assistant to the principal. Barnes and Deliford held James by his arms and legs and placed him, struggling, face down across a table. Wright administered at least twenty licks.<sup>10</sup> After the paddling, Wright told James to wait outside his office—"he said if I move he was going to bust me on the side of my head"—(Tr. 144), but James went home anyway.

At home, James examined his injuries; according to him, his backside was "black and purple and it was tight and hot." (Tr. 146) James' mother took him to a local hospital. The examining doctor diagnosed the cause of James' pain to be a "hematoma." "The area of pain was tender and large in size, and \* \* \* the temperature of the skin area of the hematoma was above normal which is a sign of inflammation often associated with hematoma."<sup>11</sup> The doctor prescribed pain pills, a laxative, sleeping pills and ice packs, and advised James to stay at home for at least a week (Tr. 148). A different doctor ex-

10. The district court found that James Ingraham "received 20 licks with a wooden paddle, which produced a painful and serious hematoma on his buttocks." (R. 1561)

11. Stipulated testimony of Dr. Fernando Milanes (R. 1557).

12. Stipulated testimony of Dr. Carlos Games (R. 1558).

13. Exhibit 8, in form of prescription signed by Dr. Games.

14. "Dressing out" refers to putting on the proper uniform for physical education class. According to Roosevelt, he was once paddled for not having white socks. His teacher

examined James on October 9, when he returned to the hospital for treatment, and on October 14. This doctor described James' injury as follows: "The patient's subjective [sic] signs of injury included a hematoma approximately six inches in diameter which was swollen, tender and purplish in color. Additionally, there was serousness or fluid oozing from the hematoma."<sup>12</sup> On October 14, eight days after the paddling, this doctor indicated that James should rest at home "for next 72 hours."<sup>13</sup> James testified that it was painful even to lie on his back in the days following the paddling, and that he could not sit comfortably for about three weeks (Tr. 149).

Roosevelt Andrews, the other named plaintiff, testified that he was paddled about ten times in one year at Drew (Tr. 273). He was paddled a number of times by his physical education teachers for being late or for not "dressing out."<sup>14</sup>

On one occasion, a teacher stopped Roosevelt, told him he could not possibly get to his next class in time and then took him to Barnes. Barnes told Roosevelt to go into a bathroom with a number of other boys. Barnes allegedly lined about 15 boys up against the urinals and paddled them. According to Roosevelt, the blows must have hurt, because some of the boys were "hollering, cry, prayed, and everything else" [sic] (Tr. 294). After the other boys left, Roosevelt told Barnes that he would have made it to class if the teacher had

refused to listen to his explanation that his socks had been stolen. On another occasion, Roosevelt was paddled for not having tennis shoes, although he tried to explain to the teacher that someone had stolen his shoes and that he could not get new ones because his family could not afford them.

Another student, Reginald Bloom, testified that he was paddled for not having gym shorts, although his shorts had been stolen. Other students at Drew and other schools also testified to paddlings in physical education class, for such offenses as not dressing out, lateness, talking at inappropriate times, and other minor misconduct. These paddlings normally consisted of one or two or sometimes three licks.



not stopped him. Barnes told Roosevelt to bend over. Roosevelt refused. Then, according to Roosevelt, Barnes

"pushed me against the urinate thing, the bowl, and then he snatched me around to it and that's when he hit me first. He first hit me on the back-sides and then I stand up and he pushed me against the bathroom wall, them things—that part the bathroom, the wall \* \* \*. Between the toilets, he pushed me against that and then he snatched me from the back there and that's when he hit me on my leg, then hit me on my arm, my back and then right across my neck, in the back here."

(Tr. 295.) Incensed over his treatment, Roosevelt complained to Wright, but Wright seemed to support Barnes, his co-administrator.

At a later time, Wright paddled Roosevelt, apparently for the breakage of some glasses in sheet metal class, although Roosevelt claimed it was not his fault. Roosevelt testified that during this paddling, his wrist was hit, and that painful swelling occurred. Roosevelt went to see a doctor about his wrist. The doctor gave him pain pills and advised him to keep something cold on his wrist.<sup>15</sup> For about a week his wrist hurt, and he could not use his arm.

15. Roosevelt's mother, Mrs. Willie Everett, supported Roosevelt's description of his wrist injury.

16. James Ingraham, Roosevelt Andrews, Daniel Lee, Reginald Bloom, Ray Jones and Nicky Williams also testified that Barnes carried a paddle with him around the school. Mrs. Everett, Alphonse Hicks and Larry Jones saw Barnes at school with brass knuckles. Reginald Bloom claimed he saw Deliford with brass knuckles. The apparent visibility of the paddle and of the brass knuckles may have affected the atmosphere at Drew.

17. As described by Daniel Lee and other witnesses, a student about to be paddled at Drew was sometimes required to bend over the back of a chair with his hands on the front of the seat of the chair. A number of witnesses testified that if the student let the chair go, or in some other fashion failed to

Donald Thomas testified that Barnes carried a paddle with him when he walked around the school and that Deliford carried brass knuckles.<sup>16</sup> Donald further testified to a scheme of punishment used in the auditorium. The seats were numbered and each student had an assigned seat. If a student misbehaved, his number was put on the board. Then Barnes would come into the auditorium and paddle the students whose numbers were listed, without asking who had done what. About five to eight students were paddled every day, generally receiving four or five licks or so each. Donald claimed he was paddled under these circumstances between 5 and 10 times. Another student, Nicky Williams, who was paddled under this system, complained that Barnes would not listen to any explanations.

Daniel Lee, who was paddled "lots of times" (Tr. 463) at Drew, described how on one occasion Barnes had a number of students "in a line, holding onto the chair, already paddling them,"<sup>17</sup> and asked him to come over and "get a little piece of the board." (Tr. 480-481.) Daniel asked what he had done, and Barnes allegedly grabbed him and tried to throw him on the chair. In the ensuing confusion, Barnes hit Daniel on the hand four or five times.<sup>18</sup> The hand

take the punishment as prescribed, extra licks were given. Daniel Lee testified that on one occasion, Deliford told a group he was punishing that, "If you let go, if you let the chair go, every time you let the chair go, that's fifteen more licks. If you count to three and you don't be back down on the chair, that's fifteen more licks." (Tr. 479; see also 477.)

18. On cross-examination, the following exchange occurred:

"Q. Are you telling the Court that Mr. Barnes hauled off and deliberately hit you on the hand?

"A. Yes, sir; because he tried to throw me against the chair, you know, and I wouldn't get over there and so he grabbed me and hit me on the hand with the board.

"Q. He was trying to hit you on the rear end, wasn't he?

"A. No.

swelled and hurt "and the bone was—it seems like the bone was going to come out" (Tr. 481), so Daniel's mother took him to the hospital for an X-ray. According to Daniel, a bone in his right hand was fractured. The Court, observing Daniel's hand, stated that "It seems to me to be disfigured, a portion of his right knuckle is enlarged to some degree." Daniel claimed that his hand still hurt, and swelled if he tried to use it.

Reginald Bloom testified that he was paddled at Drew about 15 times. One time Deliford paddled Reginald about fifty licks for allegedly making an obscene phone call to a teacher. Reginald claimed at the time that he had not made the call, and later another boy confessed to making it. Reginald testified on cross-examination that Deliford seemed to be hitting him as hard as he could, and that after the paddling was over, he had to go home because he couldn't sit down. A doctor examined Reginald's buttocks and prescribed ice packs. Reginald found it painful to sit down for about three weeks. Reginald's mother testified that her son's buttocks were "black and blue right across," swollen, and sore. She testified further that she applied ice packs to his buttocks for about three days or more after he was paddled. Another time Reginald and some other boys were called into the principal's office and accused of fighting on the way home from school. When the boys refused to be paddled, Deliford, Barnes and Wright allegedly manhandled one of the boys:

"Mr. Deliford grabbed him and Mr. Barnes and Mr. Deliford started jumping on him, throwing him around the room in the office.

"Then Mr. Wright, he got with Mr. Deliford and Mr. Barnes and started throwing the boy around the room,

"Q. Are you saying he deliberately hit you on the hand?

"A. Yes, sir.

"Q. That has made your hand swell up?

"A. Yes, sir." (Tr. 487-489.)

hitting him, throwing him on the table."

(Tr. 517.) The boy cried out that the men had broken his hand and two weeks later came back to school with a bandage on his hand. Reginald also testified that Barnes paddled boys for chewing gum and for not tucking in their shirt-tails.

Ray A. Jones and a boy named Carson were brought to the office at Drew by a policeman for "playing hooky." Deliford and Barnes gave each boy about fifty licks, causing both boys to cry. Two girls were present during this punishment and after the boys were paddled, the girls received about five licks each. Ray testified that he was unable to sit comfortably for about two weeks. Ray's grandmother stated that when she looked at Ray's buttocks, she saw "big swollen places."

Rodney Williams testified that because he wanted to wipe some foreign matter off his seat in the auditorium before sitting down, his number was put on the board and Barnes later took him to his office. Because he thought he was innocent, Rodney refused to "hook up."<sup>19</sup> Rodney testified that Barnes then hit him five or ten times on his head and back with a paddle, and then hit him with a belt. The side of Rodney's head swelled, and an operation proved necessary to remove a lump of some sort which had developed where Rodney had been struck. Rodney was out of school for about a week, and felt that the operation affected his memory and thinking. Another time, after Deliford had given him ten licks, Rodney's chest hurt and he threw up "blood and everything" (Tr. 601). Perhaps because he had asthma and heart trouble of some sort, Rodney also reacted to this paddling by "shaking all over" and "trembling," and required treatment at a local hospital. On a later occasion, a paddling

19. To assume a position standing in back of a chair, with hands on the seat of the chair, in preparation to being paddled.

by Wright again caused Rodney to cough up blood (Tr. 604).

Larry Jones testified that physical education teachers at Drew paddled him about ten times and that Deliford paddled him a "heap of times"—about ten. Several times Larry received ten licks. On one occasion, when Larry refused to be paddled, "he [Deliford, or perhaps Barnes] had to start hitting me with that stick, and he put two knots on my head" (Tr. 651).

Janice Dean testified that, on her first day at Drew, she did not know about assigned seats in the auditorium and sat in the wrong place. As a result, Deliford gave her five licks. Another time, when Janice was sent to the office, Barnes administered fifteen licks, apparently without knowledge of the alleged misconduct, on a theory he allegedly explained as follows: "He said he knew we had done something wrong or we wouldn't have been there." (Tr. 819).

Preston Sharpe testified that during four years at Drew, Deliford paddled him about ten times. One time Preston was paddled for having his shirttail hanging out. Another time, when he was supposed to receive ten licks, Preston received five extra licks for not reassuming a paddling position quickly enough after one of the licks, and three extra licks for allowing the chair to move and hit a door.

Nathaniel Evans testified that during one year at Drew, he was paddled four times. On one occasion, when the typing class was noisy, Barnes gave each of the fifteen students five licks. Another

time, when Barnes was trying to find out who had been whistling, he took a class of 30-50 students and methodically began to paddle each student in an attempt to locate the one who had been whistling. After about half of the class had been paddled, some students told Barnes who had whistled, and the rest of the class was spared. Nathaniel received ten licks on another occasion when his name, along with six others, was written on the board in the auditorium.

### III.

#### CRUEL AND UNUSUAL PUNISHMENT

[6] The Eighth Amendment prohibits the infliction of "cruel and unusual punishment." It is applicable to the states through the due process clause of the Fourteenth Amendment. *Robinson v. California*, 1962, 370 U.S. 660, 82 S. Ct. 1417, 8 L.Ed.2d 758; *Furman v. Georgia*, 1973, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346.

[7-9] A number of federal courts have held that corporal punishment of school children is not *per se* a violation of the constitutional prohibition against cruel and unusual punishment. *Ware v. Estes*, N.D.Tex.1971, 328 F.Supp. 657, *aff'd per curiam* 5 Cir. 1972, 458 F.2d 1360; *Whatley v. Pike County Board of Education*, N.D.Ga.1971, C.A. 977 (three-judge district court); *Glaser v. Marietta*, W.D.Pa.1972, 351 F.Supp. 555; *Sims v. Board of Education of Independent School Dist. No. 22*, D.N.M. 1971, 329 F.Supp. 678.<sup>20</sup> We agree that

We find this approach unpersuasive. It was succinctly stated in Vol. 6 *Harv. Civ. Rights—Civ. Lib. L. Rev.*, *Corporal Punishment in the Public Schools*, p. 583 n. 24:

"In *Trop v. Dulles*, 356 U.S. 80, 94-100 [78 S.Ct. 590, 2 L.Ed.2d 630] (1958), the Supreme Court, in applying the eighth amendment to all punishments inflicted pursuant to 'penal laws,' set forth two tests to determine the meaning of penal. First, there must be the imposition of a 'disability for the purpose of punishment.' *Id.* at 90 [78 S.Ct. 590]. Second, there must be the prescription of a 'consequence

at the present time corporal punishment *per se* cannot be ruled violative of the Eighth Amendment. Mild or moderate use of corporal punishment as a disciplinary measure in an elementary or secondary school normally will involve only transitory pain of a non-intense nature and will not cause intense or sustained suffering or permanent injury. For this reason, although many might object to corporal punishment for a variety of reasons, such punishment *per se* cannot presently be held to be "excessive" in a constitutional sense,<sup>21</sup> or so "degrading" to the "dignity" of school children as to violate the Eighth Amendment.<sup>22</sup> Al-

that will befall one who fails to abide by regulatory provisions . . . . *Id.* at 97 [78 S.Ct. 590].

"Infliction of corporal punishment by public school personnel meets both tests." Corporal punishment of schoolchildren is "punishment" in every sense of the word, whether it is called "criminal" or "civil." *Cf. In re Gault*, 1967, 387 U.S. 1, 17, 87 S. Ct. 1428, 18 L.Ed.2d 527. Corporal punishment is used by state officials to punish students for misbehavior committed during attendance at school, and resembles statutorily prescribed punishments for crimes in its purposes and effects. Some of the offenses punished by corporal punishment are in fact essentially criminal in nature, such as assaults or destruction of property. No doubt for these reasons, most courts which have considered the constitutionality of corporal punishment have assumed that such punishment may be evaluated under eighth amendment standards. See especially *Nelson v. Hoynes*, 7 Cir. 1974, 401 F.2d 332, and *Bramlet v. Wilson*, 8 Cir. 1974, 495 F.2d 714. In *Bramlet* the court said, "an excessive amount of physical punishment [in a public school setting] could be held to be cruel and unusual and therefore prohibited." The court also stated, "the designation of conduct as other than 'punishment' is simply a label of convenience and will not obviate an eighth amendment inquiry." *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973)."

In *Jackson v. Bishop*, 8 Cir. 1968, 404 F.2d 571, and *Wright v. McMann*, 2 Cir. 1967, 357 F.2d 519, courts found impermissible cruelty in offensive "punishments" devised by prison officials, and at least some members of the Supreme Court have acknowledged the propriety of these findings. See *Furman v. Georgia*, 1972, 408 U.S. 238, 284, 92 S.Ct. 2726, 33 L.Ed.2d 346 (Chief Justice Burger dissenting, joined by Justices Black-

mun, Powell and Rehnquist). We think punishments devised by school officials are similarly subject to Eighth Amendment scrutiny. Paraphrasing the opinion in *In re Gault*, *supra*, 387 U.S. at 47, 87 S.Ct. 1428, it would indeed be surprising if the Eighth Amendment protected hardened criminals but not school children.

mun, Powell and Rehnquist). We think punishments devised by school officials are similarly subject to Eighth Amendment scrutiny. Paraphrasing the opinion in *In re Gault*, *supra*, 387 U.S. at 47, 87 S.Ct. 1428, it would indeed be surprising if the Eighth Amendment protected hardened criminals but not school children.

21. *O'Neil v. Vermont*, 1892, 144 U.S. 323, 339, 12 S.Ct. 603, 38 L.Ed. 450 (Field, J. dissenting); *Furman v. Georgia*, *supra*, 408 U.S. at 270-280, 92 S.Ct. 2726 (Brennan, Jr., concurring).

22. *Furman v. Georgia*, *supra*, 408 U.S. 271-273, 92 S.Ct. 2726 (Brennan, Jr., concurring); *Trop v. Dulles*, 1958, 356 U.S. 86, 100, 78 S.Ct. 590, 2 L.Ed.2d 630.

23. According to a Report of the Task Force on Corporal Punishment published in 1972 by the National Education Association, at p. 28, submitted by the plaintiffs, corporal punishment is banned by state law in New Jersey and Massachusetts, and by state school board policy in Maryland. It is also banned, according to this report, in a number of large cities. However, at p. 24 of the report, it is stated that 13 states specifically permit corporal punishment, while in other states the teacher is given the same authority as the parent to discipline the child, or is simply authorized to maintain order and discipline in the classroom. Although the situation may have changed somewhat since 1972, apparently corporal punishment of school children is still allowed in a large number of jurisdictions. This contrasts with the circumstances in *Jackson v. Bishop*, 8 Cir. 1968, 404 F.2d 571. In that case, where the court held that the use of the strap in the Arkansas prisons violated the Eighth Amendment, the court took into consideration the fact that only two states still permitted the use of the strap. See 404 F.2d at 580.

20. In *Gonyaw v. Gray*, D.Vt.1973, 361 F. Supp. 368, 369, as one ground for dismissal of an action brought by parents of students subjected to corporal punishment, the court stated that, "This statute does not offend the protection against cruel and unusual punishment secured by the Eighth Amendment, since this amendment provides a limitation against penalties imposed for criminal behavior. . . . Since neither plaintiff was punished for an offense which was criminal in nature, the Eighth Amendment does not proscribe the conduct assigned to the defendants." (Citations omitted.)



Georgia, *supra*, 408 U.S. at 277-279, 92 S.Ct. 2726 (Brennan, J., concurring), or that it is "abhorred" by popular sentiment, *Furman v. Georgia*, *supra*, 408 U.S. at 332, 92 S.Ct. 2726 (Marshall, J., concurring).<sup>24</sup>

[10] Examining the specific policies on corporal punishment promulgated by the Dade County School Board, we find in them no violation of the Eighth Amendment. These policies do nothing more than authorize the mild or moderate use of such punishment. Policy 5144, revised effective August 5, 1970,<sup>25</sup> provides that the punishment must be administered "in kindness." "[N]o instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck." Further, corporal punishment "should never be administered to a student whom school personnel know to be under psychological or medical treatment unless there has been a pre-conference with the school psychologist or the physician."

Policy 5144 was revised extensively effective November 3, 1971. This revision imposes specific limits on the number of strokes—a maximum of five strokes for elementary school children and a maximum of seven strokes for junior and senior high school children.

24. The dissenters in *Furman v. Georgia* emphasized the fact that "Capital punishment is authorized by statute in 40 States, the District of Columbia, and in the federal courts for the commission of certain crimes" (408 U.S. at 385, 92 S.Ct. at 2801), and that juries acting as "the conscience of the community" (408 U.S. at 388, 92 S.Ct. 2726), continued to impose capital punishment. See 408 U.S. at 385-391, 92 S.Ct. 2726 (Burger, C. J., dissenting). Justice Brennan suggests, however, that "The acceptability of a severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use." 408 U.S. at 279, 92 S.Ct. at 2747. The evidence showed that capital punishment had actually been imposed only rarely in recent years. See 408 U.S. at 291 n. 40, 92 S.Ct. 2726. The plaintiffs do not suggest that corporal punishment has become so offensive that it is no longer in general use in many States.

It requires the use of an instrument "calculated to eliminate possible physical injury." The punishment must be administered "posteriorly," and "under no circumstances shall a student be struck about the head or shoulders." The former provision as to students under psychological or medical treatment is retained. Emphasis upon consideration of the "nature of the misconduct" and the "seriousness of the offense," and the requirement of recording the "infraction of rules which caused the punishment," make it clear that the punishment is not to be inflicted arbitrarily or without cause. This revision is not obnoxious to the Eighth Amendment; it represents an effort to insure through specific guidelines that corporal punishment in Dade County will not go beyond "the moderate use of physical force or physical contact, as may be necessary to maintain discipline and to enforce school order and rules."

Although Policy 5144 does not on its face conflict with the Eighth Amendment, it is necessary to inquire further and to determine whether corporal punishment as applied in the Dade County schools offends Eighth Amendment standards. In fact, we deem it more important to know how corporal punishment is actually administered than to know the relevant rules or regulations.<sup>26</sup>

25. Policy 5144 was revised again on December 9, 1970, but there were no substantive changes in those parts of the policy dealing with corporal punishment.

26. The opinion of Judge (now Justice) Blackmun in *Jackson v. Bishop*, 8 Cir. 1968, 404 F.2d 571, 579, 580, finds that corporal punishment in prisons is difficult to adequately control by rules or regulations:

"We are not convinced that any rule or regulation as to the use of the strap, however seriously or sincerely conceived and drawn, will successfully prevent abuse. . . . Rules in this area seem often to go unobserved. . . . Regulations are easily circumvented. . . . Corporal punishment is easily subject to abuse in the hands of the sadistic and the unscrupulous. . . . Where power to punish is granted to persons in lower levels of administrative authority, there is an inherent and natural difficulty in enforcing the limitations of

[11] From the evidence presented, we cannot say that the actual practice of corporal punishment in the Dade County school system as a whole violates the Eighth Amendment. However, we conclude that the plaintiffs' evidence as to the pattern, practice and usage of corporal punishment at Drew Junior High School was such that the trial court erred in dismissing Count Three under Rule 41(b), F.R.Civ.P., and also erred in dismissing Counts One and Two.

It is unclear whether the district court directly considered whether the pattern of punishment at Drew is violative of the Eighth Amendment. The district court found that "The instances of punishment which could be characterized as severe, accepting the students' testimony as credible, took place in one junior high school." There is no doubt that this is a reference to Drew. In its conclusions of law, the district court declared that "Considering the system as a whole, there is no showing . . .

that power. . . . There can be no argument that excessive whipping or an inappropriate manner of whipping or too great frequency of whipping or the use of studded or overlong straps all constitute cruel and unusual punishment. But if whipping were to be authorized, how does one, or any court, ascertain the point which would distinguish the permissible from that which is cruel and unusual?"

" . . . we have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment; that the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess . . . ."

The problems of control suggested in *Jackson* must also exist to some extent in schools, although perhaps to a lesser degree. It is for this reason that we are especially concerned with the actual administration of corporal punishment in the Dade County schools. If we found that adequate controls did not exist, or could not be established, we would be forced to consider adopting the remedy used in *Jackson*, namely, an injunction against any use of corporal punishment. That result must ensue if the controls prove inadequate. It has been recently argued

[of a violation of the Eighth Amendment]. At another point, the district court stated that "The evidence has not shown that corporal punishment in concept, or as authorized by the School Board, or as applied throughout the system, is arbitrary, capricious, unreasonable or wholly unrelated to the legitimate state purpose of determining its educational policy." Apparently the district court felt that a constitutional violation could be shown only by evidence sufficient to prove employment of cruel and unusual punishment throughout the entire Dade County school system.

[12] We think that such an approach would be incorrect. In our view, a violation of the Eighth Amendment can occur at the level of a single educational institution. The record in this case demonstrates that individual schools in Dade County have great independence in the development of a policy or system as to corporal punishment.<sup>27</sup> This makes it appropriate to examine whether the au-

that a total ban on this punishment is the only effective control:

"While theoretically corporal punishment need not be brutal, there is no assurance that it will be inflicted moderately or responsibly. In the heat of anger, especially if provoked by personal abuse, some teachers are likely to exceed legal bounds. Moreover, if limited corporal punishment were permitted, controls would be unlikely to prevent the 'really unmistakable kind of satisfaction which some teachers feel in applying the rattan.' A total ban of this punishment would provide far more effective control."<sup>28</sup>

<sup>28</sup> J. Kozol, *Death at an Early Age* 16-17 (1967).

<sup>29</sup> A rule forbidding all corporal punishment would probably receive more compliance than the common law principles because all parties involved are more likely to be aware of it and conscious of any violation. This would likely be reinforced by the added ease of convicting a violator, simply by holding the school official involved in contempt of a court order, where injunctive relief is obtained."

6 *Harv. Civ. Rights—Civ. Lib. L. Rev.*, Corporal Punishment in the Public Schools, p. 585.

27. This is reflected by the system developed at Drew, as well as by the fact that at least sixteen schools have discontinued the use of corporal punishment.

thorities at Drew imposed a system of punishment violative of the Eighth Amendment.<sup>28</sup>

From the evidence presented, it appears that Wright, the principal; Deliford, the assistant principal; and Barnes, an assistant to the principal, all agreed either explicitly or implicitly to impose a harsh regime upon the students at Drew. This is dramatically illustrated by their cooperation in administering corporal punishment to James Ingraham. It is further demonstrated by other instances where two or all three administrators were present during paddlings, or were aware of paddlings after they occurred.<sup>29</sup> Considering the evidence as a whole, it would be incredible to find that any one of these three individuals was unaware of the punishment policy pursued by the other two. Thus, the regime at Drew Junior High School was in fact a system of punishment established and imposed by those in authority.

28. Eighth Amendment cases in analogous situations support this approach. In *Nelson v. Heyne*, 7 Cir. 1974, 491 F.2d 352, the Seventh Circuit concluded that the district court did not err in deciding that disciplinary beatings at the Indiana Boys School constituted cruel and unusual punishment. This school had a population of about 400 juveniles. In *Wright v. McMann*, 2 Cir. 1967, 387 F.2d 519, the Second Circuit held that the allegations that the punishments imposed at a particular New York State prison violated the Eighth Amendment should not have been dismissed.

29. For example, after Roosevelt Andrews was paddled by Barnes in a bathroom, he complained to Wright while Deliford was also present, and his father later complained to Barnes, Deliford and Wright. On a later occasion, Wright paddled Andrews and allegedly hit him on the wrist while Deliford and Barnes were present. Reginald Bloom testified that Deliford, Wright and Barnes manhandled and struck a boy suspected of fighting. Ray Jones testified that Deliford and Barnes were both present when he and another student received fifty licks each, and that the two administrators took turns giving the licks. Larry Jones testified that Deliford and Barnes were both present when he received "two knots on my head."

30. The district court stated in the order of dismissal that, "After having heard the tes-

[13] The injuries sustained by various students at Drew demonstrate that the punishment meted out at this school was often severe, and of a nature likely to cause serious physical and psychological damage.<sup>30</sup> The evidence of paddlings for relatively minor offenses, sometimes without any opportunity for the student to explain what happened, show that the punishment was sometimes arbitrary. The frequency of the use of corporal punishment suggests real oppressiveness.

[14] Whether punishment is cruel and unusual in a constitutional sense depends to a significant degree upon the circumstances surrounding the particular punishment. *O'Neil v. Vermont*, 1892, 144 U.S. 323, 337, 12 S.Ct. 693, 36 L.Ed. 450 (Field, J., dissenting); *Robinson v. California*, *supra*; *Furman v. Georgia*, *supra*.<sup>31</sup>

In the present case, children aged twelve through fifteen were punished

timony in this case, this Court believes that corporal punishment may be administered in such a way that the resultant psychological harm to some students will be substantial and lasting."

31. In *O'Neil v. Vermont*, Justice Field in dissent opined that while the Eighth Amendment was usually applied to punishments which inflicted torture, and which were attended with acute pain and suffering, it had a wider applicability:

"The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged. The whole inhibition is against that which is excessive . . ." 144 U.S. 339-340, 12 S.Ct. 699.

Justice Marshall in *Furman v. Georgia*, 408 U.S. at 324-327, 92 S.Ct. 2726, argues persuasively that Justice Field's approach was adopted by the Court in later cases, including *Howard v. Fleming*, 1903, 191 U.S. 120, 24 S.Ct. 49, 48 L.Ed. 121; *Weems v. United States*, 1910, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793; *Louisiana ex rel. Francis v. Resweber*, 1947, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422, and *Trop v. Dulles*, 1958, 356 U.S. 80, 78 S.Ct. 590, 2 L.Ed.2d 670. In *Robinson v. California*, 1962, 370 U.S. 650, 82 S.Ct. 1117, 8 L.Ed.2d 758, the Court held that a statute which made addiction to nar-

for alleged misconduct at school. In most instances, this misconduct did not involve physical harm to any other individual or damage to property. Some students claim they never engaged in misconduct at all, but were not given an adequate opportunity to show their innocence or were ignored when they attempted to explain why they did not deserve punishment.

The system of punishment utilized at Drew resulted in a number of relatively serious injuries, and thus clearly involved a significant risk of physical damage to the child. Corporal punishment also creates a risk of psychological damage. Dr. Scott Kester, an assistant professor of educational psychology at the University of Miami, testified that corporal punishment could damage a child's development by engendering anxiety, frustration, and hostility, or by causing sheer pathological withdrawal or hatred of the school environment. He further commented that since children model their behavior after adults, a child who is corporally punished may learn from this that physical force is an appropriate way in which to handle conflicts. Dr. Kester emphasized that the child who is corporally punished often becomes more aggressive and more hostile than he was prior to his punishment.

cotica a misdemeanor inflicted a cruel and unusual punishment. The Court stated that the penalty provided by the statute—ninety days—was not, in the abstract, cruel and unusual. However, the Court classified narcotics addiction as an illness, and noted that, "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." 370 U.S. 667, 82 S.Ct. 1421.

32. In 1972, a Task Force of the National Education Association suggested a number of alternatives to the use of corporal punishment and proposed a "Model Law Outlawing Corporal Punishment":

"Corporal Punishment of Pupils

"No person employed or engaged by any educational system within this state, whether public or private, shall inflict or cause to be inflicted corporal punishment or bodily pain upon a pupil attending any school or institution within such education

The evidence shows that corporal punishment is only one of a variety of measures available to school officials to punish students and to correct behavior. As found by the district court, "alternative measures in use range from parent and student conferences, the use of guidance counselors and psychologists, where available, to suspension and expulsion."<sup>32</sup>

Taking into consideration the age of the individuals, the nature of misconduct involved, the risk of physical and psychological damage, and the availability of alternative disciplinary measures, we conclude that the system of punishment at Drew was "excessive" in a constitutional sense. The severity of the paddlings and the system of paddling at Drew, generally, violated the Eighth Amendment requirement that punishment not be greatly disproportionate to the offenses charged. Our review of the evidence has further convinced us that the punishment administered at Drew was degrading to the children at that institution.

[15] Our result is not inconsistent with *Ware v. Estes*, *supra*, and other cases involving corporal punishment of children. In the *Ware* case, there was evidence of abuse by some of the teachers in the Dallas school district, but there is no indication that the system of

system: provided, however, that any such person may, within the scope of his employment, use and apply such amounts of physical restraint as may be reasonable and necessary:

"(1) to protect himself, the pupil or others from physical injury;

"(2) to obtain possession of a weapon or other dangerous object upon the person or within the control of a pupil;

"(3) to protect property from serious harm; and such physical restraint shall not be construed to constitute corporal punishment or bodily pain within the meaning and intent of this section. Every resolution, bylaw, rule, ordinance, or other act or authority permitting or authorizing corporal punishment or bodily pain to be inflicted upon a pupil attending a school or educational institution shall be void."

See Report of The Task Force on Corporal Punishment, National Education Association, p. 20-A.



punishment in the school system as a whole, or in any particular school, approached the severity and arbitrariness of the system developed at Drew. Also, the court in *Ware* noted that in one case where a student was severely injured, the assistant principal responsible for the injury was suspended from his duties for several months. There is no indication from the record in this case that any efforts were made in the relevant time period to control or to moderate the system of punishment established by Wright, Deliford and Barnes.<sup>33</sup>

In *Nelson v. Heyne*, 7 Cir. 1974, 491 F.2d 352, 354 n. 4, the Seventh Circuit states that, "The law appears to be well settled in both state and federal jurisdictions that school officials do not violate 8th Amendment proscriptions against cruel and unusual punishment where the punishment is reasonable and moderate." (Emphasis added.) In the *Nelson* case, the court agreed with the district court's conclusion that paddlings administered by guards at the Indiana Boys School violated the Eighth Amendment. The relevant facts in that case, as described by the Seventh Circuit panel, are comparable to the facts developed in the district court with regard to Drew.

Since the plaintiffs' evidence makes a prima facie case of violation of the Eighth Amendment at Drew Junior High School, the dismissal of Count Three of the complaint must be reversed and remanded to the district court for further proceedings. While the defend-

ants must, of course, be afforded an opportunity to offer evidence, the district court may find no reason to require the plaintiffs to offer their evidence a second time. It may proceed with the case as though defendants' motion for dismissal had been denied. See *Federal Deposit Insurance Corp. v. Mason*, 3 Cir. 1940, 115 F.2d 548; *Gulbenkian v. Gulbenkian*, 2 Cir. 1945, 147 F.2d 173; 5 Moore ¶ 41.13[2].

The dismissal of Counts One and Two must be reversed and remanded for further proceedings consistent with this opinion. Our examination of the record convinces us that there was sufficient evidence produced by James Ingraham and Roosevelt Andrews to avoid a directed verdict. There was evidence of a system of punishment violative of the Eighth Amendment. There was further evidence from which a jury might conclude that Ingraham and Andrews were victims of this system. Ingraham's description of how he was punished, and the medical evidence concerning the extent of his injuries, would justify sending his case to the jury. Andrews' description of Barnes' alleged assault upon him in the bathroom, and his description of his paddling by Wright in which his wrist was injured, are enough to avoid a directed verdict. On remand, the district court may allow the joinder of whatever state claims the plaintiffs may have, in accordance with the rules concerning pendent jurisdiction. See *United Mine Workers v. Gibbs*, 1966, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218.<sup>34</sup>

ham had resisted the paddling, and did not find out how many licks Ingraham had received (Tr. 235). We note that specific intent to deprive a person of his constitutional rights is not necessary to maintain a civil rights action. *Monroe v. Pape*, 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492; *Pierison v. Ray*, 1967, 356 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288; *Whirl v. Kern*, 5 Cir. 1969, 407 F.2d 781 and cases cited therein.

34. Counsel for defendants almost conceded as much upon oral argument when in response to an inquiry he stated:

"Your Honor. The class action count was an equitable matter that was tried to the court. When the evidence was finished on

[16] Assuming that Counts One and Two continue to be for jury trial and unless otherwise stipulated, the issues of fact common to the actions at law and the suit in equity must first be heard and determined by a jury's verdict rendered on one or both of Counts One and Two. *Beacon Theatres v. Westover*, 1959, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988; *Dairy Queen v. Wood*, 1962, 369 U.S. 469, 473, 82 S.Ct. 894, 8 L.Ed.2d 44; *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 5 Cir. 1961, 294 F.2d 486; *Wright & Miller*, *Federal Practice and Procedure: Civil* § 2338.

[17] The complaint is somewhat unclear as to whether the plaintiffs allege that Superintendent Whigham is liable for damages for the paddlings to Ingraham and Andrews. Paragraph 11 of the Complaint states that, "Upon information and belief, the defendant Whigham and/or his agents and employees in the administrative hierarchy of the Dade County school system have knowingly lent their tacit or explicit support and approval to the methods of discipline and behaviorial control described herein." Yet neither the "First Cause of Action," relating to Ingraham, nor the "Second Cause of Action," relating to Andrews, mentions Whigham. Possibly the plaintiffs mean to hold Whigham responsible in damages on the basis of a negligence theory along the lines suggested in Rob-

that, we had a conference, and it was agreed between the court and the counsel that Mr. Feinberg could present any additional evidence that he wanted to present on the two individual damage counts, then the court would take under advisement my motion for directed verdict on those two counts. Now, he ruled on those two counts that the punishment of Ingraham and the punishment of Andrews didn't rise to constitutional proportions. Ingraham got 20 licks, he had bruises, painful bruises; Andrews had 2 or 3 licks, of no more than 5 licks each; and the judge simply decided that there was—that these didn't meet any of the four principles of Justice Brennan to rise to the dignity of cruel and unusual punishment, even taking all the evidence and construing it most favorably to the plaintiffs. Now, he said then that if he had been tried for those

erts v. Williams, 5 Cir. 1972, 456 F.2d 819, 827, modified, 456 F.2d 834. Although we think this matter should be clarified and dealt with initially by the district court, we note that there is some question whether the Eighth Amendment extends to include negligence.<sup>35</sup>

## IV.

## DUE PROCESS

Plaintiffs allege that corporal punishment as administered in Dade County deprives students of due process of law in violation of the Fourteenth Amendment. They claim that students are provided no procedural safeguards before corporal punishment is imposed. They further claim that corporal punishment violates due process because it is arbitrary, capricious and unrelated to the achievement of any legitimate educational purpose.

A. Policy 5144, as revised effective August 5, 1970, provides the following procedural provisions:

"If it appears that corporal punishment is likely to become necessary, the teacher must confer with the principal. The principal will determine the necessity for corporal punishment and designate the time, place and the person to administer said punishment. In any case, the student should understand clearly the seriousness of the of-

two counts before a jury, and we had a right to a jury trial and had demanded it on those,—if he had been trying those before a jury, had found no federal deprivation, he could still under the pendent jurisdiction theory have allowed it to go to the jury for damages in tort. However, in this case there would be no saving of judicial time and labor because we would have to go back and have a new jury trial all over again in order to get to that point, so he dismissed all three."

35. *Roberts v. Williams*, 5 Cir. 1972, 456 F.2d 819, 834 (Simpson, J., specially concurring); *Anderson v. Nesser*, 5 Cir. 1972, 456 F.2d 825 (en banc), 842 (Simpson, J., concurring specially and joined by Gewin, Coleman, Dyer, Morgan, Clark, Ingraham and Roney, JJ.); *Parker v. McKeithen*, 5 Cir. 1971, 458 F.2d 553, 556 n. 6.

33. Superintendent Whigham testified that he believed there was "an inquiry or objection to that incident [Ingraham's paddling of October 6, 1970] by the area office" (Tr. 103). However, Earl Wells, a school district director and administrator, who investigated the Ingraham paddling, testified that as a result of his investigation, "I formulated an opinion that Mr. Wright had a right to paddle the child" (Tr. 234). When asked whether he had formulated an opinion as to whether or not Mr. Wright acted appropriately concerning the paddling of Ingraham, Wells replied, "I think he did" (Tr. 234). Wells explained that he formulated his opinion on the basis of Wright's intent, but admitted that he did not know whether Ingra-

fense and the reason for the punishment. Care should be taken that the period of time between the offense and the punishment is not so long as to cause undue anxiety in the pupil."

The revision effective November 3, 1971 retains the substance of these provisions, with a few additions. Under the revision, the principal may designate an individual with whom the teacher must consult and who may direct the administration of corporal punishment. Also, the principal must maintain a log of all instances where corporal punishment is administered.

Plaintiffs in this case argue that if corporal punishment is not *per se* unconstitutional, still a child has a constitutional right to be free from unwarranted punishment. In reliance upon *Dixon v. Alabama*, 5 Cir. 1961, 294 F.2d 150, and later cases, the plaintiffs claim that corporal punishment in Dade County is administered without adequate procedural safeguards. The defendants apparently concede that corporal punishment in Dade County is a relatively serious punishment. In their brief they state that "Corporal punishment in the public schools of Dade County, Florida, is a last resort means of discipline as an alternative to suspension or expulsion \* \* \*." (Defendants' Brief, p. 17.) Defendants state that a list of infractions for which corporal punishment would be administered would remove a "judgment aspect" otherwise applicable as to whether such punishment should be administered to a particular student. Defendants further say that a formal hearing would not be desirable because it would lengthen the time before punishment, and lead to undue anxiety on the part of the student involved.

The district court found that, "There is no published schedule of infractions for which corporal punishment is authorized, nor any formal procedural requirements which must be observed before punishment may be administered." In its conclusions of law, the district court stated that,

"The concept of due process is premised upon fairness and reasonableness in light of the totality of the circumstances then existing. The due process limitation does not unduly confine officials who have the responsibility of governing. Whether the constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors.

"It seems to this Court that if there is any good purpose to be served by corporal punishment in the schools, such purpose would be long since passed if formal notice and hearing were required before a paddling. There has been no deprivation of 'due process.'"

[18] We agree with the district court that the full panoply of procedures associated with the judicial process are not required in determining whether to administer corporal punishment. At the same time, due process demands that the procedures followed by school officials comport with fundamental fairness. See *Hannah v. Larche*, 1960, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307.

The approach outlined in *Whitley v. Pike County Board of Education*, N.D. Ga.1971, No. 977 (unreported, three-judge district court) suggests an appropriate resolution of the due process question. In a case involving an eleven-year-old pupil, the court said:

"Where, as here, the pupil was to be promptly corrected for his transgressions, and long-term consequences stemmed only from his refusal to accept his punishment, the flexible elements of due process require only that the student know and understand the rule under which he is to be punished, and that in cases where there is doubt as to the actual offender, further inquiry be made by the school officials concerned."

If a student must "know and understand" the rule under which he is to be punished, then clearly the school authorities must tell him before he is punished

precisely what he has done which merits punishment. If the student concedes that he has engaged in misconduct, then all that remains is to determine whether corporal punishment is appropriate, and to determine the details of its administration. In Dade County, under Policy 5144, the principal or his administrative designee is responsible for making these decisions. Thus, these decisions are usually made by someone who was not directly involved in the circumstances surrounding the alleged misconduct.

[19, 20] If the student concedes that he has engaged in certain conduct, but claims that he did not know that such conduct was prohibited, the school authorities should proceed with caution. Inquiry should be made to determine whether the student knew or should have known that his conduct violated school rules or policies. Punishment of any sort would be patently unfair where the student was genuinely unaware of a school regulation, and had no reason to know that he was engaging in conduct which might later be used as a basis for punishment. Cf. *St. Ann et al. v. Palisi et al.*, 5 Cir. 1974, 495 F.2d 423. The publishing of written rules of conduct would obviously eliminate many problems which might arise in this area.

[21-23] If the student claims that he is innocent of the conduct which merits punishment, school officials should make sufficient inquiries to insure that, to the contrary, the student is guilty beyond any reasonable doubt. After all, once the student is corporally punished, no retraction of punishment is possible. This means that eyewitnesses should be questioned by the principal or his designee and the student should be allowed to

call witnesses in his own behalf. Also, the student should be allowed to respond to the witnesses against him, and in some cases he should be accorded an opportunity to ask them relevant questions. Of course, all of this may take place in an informal setting, and no formal rules of procedure or evidence need be followed.

[24] Examining the procedures prescribed under Policy 5144, we find them not inconsistent with the procedures we have outlined. In implementing Policy 5144, most principals probably already follow the procedural guidelines we have suggested. Of course, the testimony of students from Drew indicates that this has not uniformly been the case.<sup>36</sup>

B. Plaintiffs urge that corporal punishment is unrelated to the achievement of any legitimate educational purpose. The testimony of Dr. Kester supports this claim to some extent. Dr. Kester stated that could think of "no reputable authority who recommends corporal punishment" (Tr. 737), and that he could not think of "a renowned or leading authority in psychology, educational psychology, educational research, psychiatry, who advocates corporal punishment in the public schools or in the schools" (Tr. 756). He modified his position somewhat by stating the he could think of no reputable authority who recommended corporal punishment to suppress behavior "without immediately following it as soon as possible with a positive reinforcement of acceptable behavior." Dr. Kester also conceded that there might be some authorities who favored corporal punishment,<sup>37</sup> and that "some may say that it accomplishes the thing that I have already said that it accom-

36. We are particularly disturbed by the testimony that whole classes of students were corporally punished for the misconduct of a few. A number of students claimed that physical education teachers in particular would occasionally give everyone in the class one or two swats when the class was noisy, or when something was stolen. (Tr. 420-31, 301, 637-8, 647, 800-811, 873, 878.) Cf. *St. Ann et al. v. Palisi et al.*, 5 Cir. 1974, 495 F.2d 423.

37. "As I said before, sir, I have not read of someone I consider to be an authority, a leading authority in the field, in fact I can't remember an instance, although I'm sure there is somebody who writes something somewhere who could get it in print—you can get almost anything in print—who said that corporal punishment is a good thing." (Tr. 755-756.)



plished: that you can terminate an unwanted behavior if you are willing to bear the consequences, however negative they may be" (Tr. 756). Also, counsel for plaintiffs stated that he did not propose to establish that there is not a shred of psychological or educational justification for corporal punishment.

[25, 26] In light of the concessions by plaintiffs' expert and plaintiffs' counsel, and in light of other cases involving corporal punishment where there apparently was evidence of the utility of corporal punishment,<sup>38</sup> we are unwilling to say that mild or moderate corporal punishment is unrelated to the achievement of any legitimate educational purpose. However, in this case the severe punishment meted out at Drew went beyond legitimate bounds.

In *Dixon v. Alabama*, 5 Cir. 1961, 294 F.2d 150, 157, this Court stated:

"Turning then to the nature of the governmental power to expel the plaintiffs, it must be conceded \* \* \* that that power is not unlimited and cannot be arbitrarily exercised. Admittedly, there must be some reasonable and constitutional ground for expulsion or the courts would have a duty to require reinstatement."

In a recent case, this language was explained as follows:

"This passage and the constitutional provision it elaborates do not license federal courts to review and revise school board disciplinary actions at will. Application is limited to the rare case where there is shocking disparity between offense and penalty."

*Lee v. Macon County Board of Education*, 5 Cir. 1974, 490 F.2d 458, 460 n. 3. In the present case, as regards Drew Junior High School, there exists "a shocking disparity" between the offenses committed by various of the students and the harsh punishment imposed by

school officials. Thus, we conclude that the system of punishment at Drew not only violated the constitutional prohibition against cruel and unusual punishment, but also violated due process. Cf. *Anderson v. Nossor*, 5 Cir. 1972, 456 F.2d 835 (*en banc*); *St. Ann et al. v. Palsi et al.*, *supra*.

## V.

### RIGHT OF THE PARENT AND CHILD TO PROHIBIT CORPORAL PUNISHMENT BY SCHOOL OFFICIALS

[27] Paragraph 17 of the complaint alleges that following a beating administered to Roosevelt Andrews, Roosevelt's father instructed school officials to refrain from assaulting, beating or otherwise physically injuring his son. Paragraph 18 of the complaint alleges that despite these instructions, Roosevelt was later paddled by school officials. Paragraph 22 of the complaint alleges that corporal punishment abridges a student's right to physical integrity, dignity of personality, and freedom from arbitrary authority in violation of the Fourth, Ninth and Fourteenth Amendments. At trial, Phyllis Straus, the mother of four children who attend Dade County schools, testified that despite her explicit directions, her children had been corporally punished. A number of children, including James Ingraham, testified that they had refused to accept corporal punishment, but were paddled anyway. In our view, the plaintiffs clearly raised the issue of whether school officials may properly administer corporal punishment if the parent or child has objected to its administration.

In *Ware v. Estes*, N.D.Tex.1971, 328 F.Supp. 657, the district court dismissed an action where the plaintiffs alleged in part that the defendants administered corporal punishment without the prior permission of the parent or student in violation of the Fourteenth Amendment.

The district court's reasoning is revealed by the following portion of its opinion:

"Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1922), the state cannot unreasonably interfere with the liberty of parents and guardians to direct the upbringing and education of children under their control. These parental rights are not beyond limitation. *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645, 652 (1943). In order for a deprivation of due process under the Fourteenth Amendment, to occur, the rules and policies of the school district must bear 'no reasonable relation to some purpose within the competency of the State.' *Pierce v. Society of Sisters*, 268 U.S. 510, 535, 45 S.Ct. 571, 573, 69 L.Ed. 1070, 1076 (1924).

"According to the testimony, it cannot be said that the Dallas Independent School District's policy on the use of corporal punishment bears no reasonable relation to some purpose within the competency of the state in its educational function."

328 F.Supp. at 658-659. On appeal, this Court simply stated the following: "We are in agreement with the well-considered memorandum opinion of the district court \* \* \* and its judgment is affirmed." *Ware v. Estes*, 5 Cir. 1972, 458 F.2d 1360.<sup>39</sup>

The result in *Ware* depends to some extent upon the particular circumstances revealed by the evidence in that case. In the present case, the school authorities have presented no evidence, and so have had no opportunity to demonstrate the extent to which corporal punishment is a useful or necessary disciplinary measure in Dade County.<sup>40</sup> In any event,

39. In *Whitley v. Pike County Board of Education*, D.Ga.1971 (unreported, three-judge district court), the court disagreed with plaintiff's argument that "the sanctity of the family relationship, the so-called right of privacy, and the right to physical integrity or dignity of personality" were violated by the Georgia statute authorizing corporal

the approach taken on this issue by the district court in *Ware* deserves re-examination in light of certain recent Supreme Court cases which touch on the relationship of parent and child, and the right of privacy. These cases include *Stanley v. Illinois*, 1972, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551; *Wisconsin v. Yoder*, 1972, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15; *Roe v. Wade*, 1973, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147. It is not appropriate at the present time to attempt to resolve this issue. Instead, we suggest that, upon remand, the district court make findings of fact and conclusions of law on this aspect of the case.

The judgments of dismissal of each of the counts of the complaint are reversed and the cases are remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

LEWIS R. MORGAN, Circuit Judge, dissents.

LEWIS R. MORGAN, Circuit Judge (dissenting):

I respectfully dissent from the holdings of the majority. I feel that the majority opinion is in conflict with our holding in *Ware v. Estes*, N.D.Texas, 1971, 328 F.Supp. 657, aff'd 5 Cir. 1972, 458 F.2d 1360, cert. den., 409 U.S. 1027, 93 E.Ct. 463, 34 L.Ed.2d 321. The familiar section of the Civil Rights Act under which these actions are founded, 42 U.S.C. § 1983, provides that a person acting under color of state law who deprives another of rights, privileges, or immunities secured by the Constitution shall be liable to the injured party in an action at law or suit in equity. It is, of course, essential to recovery in cases under Section 1983 that the plaintiff estab-

lished. It is somewhat unclear exactly what the plaintiff in this case argued.

40. It is by no means certain that corporal punishment is of the same importance in every community. See, for example, *Glaser v. Marietta*, *supra*.

38. See *Ware v. Estes*, *supra*, 323 F.Supp. at 659; *Glaser v. Marietta*, *supra*, 351 F.Supp. at 557.

lish an invasion of federally protected constitutional rights; otherwise, there is no federal jurisdiction. *Rosenberg v. Martin*, 2 Cir. 1973, 478 F.2d 520. However, in a school system such as the Dade County System, with approximately 12,500 teachers and administrative personnel, a student population in excess of 242,000 pupils, and 237 schools, a disciplinary event in one school, Drew Junior High School, cannot give rise to a constitutional question and a right to have the federal courts intervene. For this reason, I would affirm the judgment of the district court which dismissed the actions.



**In re YARN PROCESSING PATENT VALIDITY LITIGATION.**

**SAUQUOIT FIBERS COMPANY,**  
Plaintiff-Appellee,

v.

**LEESONA CORPORATION et al.,**  
Defendants-Appellants.

**KAYSER-ROTH CORPORATION** (in its own name and d/b/a Kayser-Roth Hosiery Company and Kayser-Roth Hosiery Co., Inc.), Plaintiff-Appellee,

v.

**LEESONA CORPORATION,** Defendant-Appellant.

**LEESONA CORPORATION,** Plaintiff-Appellant,

v.

**The DUPLAN CORPORATION et al.,**  
Defendants-Appellees.

No. 73-2420.

United States Court of Appeals,  
Fifth Circuit.

July 29, 1974.

In a consolidated proceeding, validity of patents was challenged. The United States District Court for the South-

ern District of Florida at Miami, C. Clyde Atkins, J., 360 F.Supp. 74, granted partial summary judgment of patent invalidity, and the patent owners appealed. The Court of Appeals, Thornberry, Circuit Judge, held that an issue in the instant case as to date of "reduction to practice" was not the same as an issue in a previous Canadian case as to "date of invention," and the doctrine of collateral estoppel was therefore not applicable. The Court also held that an inventor is permitted a reasonable amount of experimentation after he has rendered his idea a reality by constructing a working model substantially embodying claims later to be patented, and during such phase a placing on sale or public use will not bar a patent so long as public use or sale is only incidental to the experimentation. The question as to whether the inventors at the time of licensing still had experimental intent and purpose which would preclude a "public use" or "on sale" bar to patentability was a material fact issue precluding summary judgment.

Reversed and remanded for further proceedings.

**1. Patents ⇐80**

Under statute, single public use or sale of invention prior to "critical date," i. e., one year before application for patent, will result in invalid patent. 35 U.S.C.A. § 102(b).

**2. Patents ⇐76**

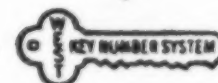
Even if no delivery is made, existence of sales contract plus reduction of invention to reality in sense that it is beyond stage of experimentation constitutes placing "on sale" within statute precluding right to patent where invention was in public use or on sale in United States more than one year prior to date of application. 35 U.S.C.A. § 102(b).

See publication Words and Phrases for other judicial constructions and definitions.

required by those regulations. Any such determination is a nullity.

Therefore, we conclude that the order of the hearing examiner requiring repayment, since not within the power conferred upon him by regulation, is void, and not properly before us for review.<sup>14</sup> With respect to that portion of the order requiring termination, the decision of the district court is reversed, and the order is reinstated.

Reversed.



**Eloise INGRAHAM, as next friend,**  
etc., et al., Plaintiffs-Appellants,

v.

**Willie J. WRIGHT, I, Individually, etc.,**  
et al., Defendants-Appellees.

No. 73-2078.

United States Court of Appeals,  
Fifth Circuit.

Jan. 8, 1976.

Action was brought by parents of public school students seeking compensatory and punitive damages and declaratory and injunctive relief with respect to use of corporal punishment in school system. The United States District Court for the Southern District of Florida, Joe Eaton, J., dismissed the action and the parents appealed. The Court of Appeals, 498 F.2d 248, reversed and remanded. The Court of Appeals, en banc, Lewis R. Morgan, Circuit Judge, held that the school superintendent was a person amenable to suit under Civil Rights Act, that the Eighth Amendment's proscription against cruel and unusual punishment did not apply to school discipline, that

In so holding, we note that the regulations specifically give the Commissioner the authori-

infliction of corporal punishment did not deprive students of substantive due process and that the infliction of a paddling did not subject school child to a grievous loss for which Fourteenth Amendment due process standard should be applied.

Affirmed.

Gewin, Circuit Judge, filed an opinion concurring in the result; Godbold, Circuit Judge, with whom Brown, Chief Judge, joined, filed a dissenting opinion; and Rives, Circuit Judge, with whom Goldberg and Ainsworth, Circuit Judges, joined, filed a dissenting opinion.

**1. Civil Rights ⇐13.7**

School board was not a "person" and could not be sued under Civil Rights Act. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

**2. Civil Rights ⇐13.7**

School superintendent was a "person" amenable to suit under Civil Rights Act for compensatory and punitive damages and for declaratory and injunctive relief as to use of corporal punishment in school system. 42 U.S.C.A. §§ 1981-1988, 1983; 28 U.S.C.A. §§ 1331, 1343; U.S.C.A. Const. Amend. 8.

**3. Criminal Law ⇐1213**

Eighth Amendment's proscription against cruel and unusual punishment does not apply to the administration of discipline, through corporal punishment, to public school children by public school teachers and administrators. U.S.C.A. Const. Amend. 8.

**4. Criminal Law ⇐1213**

Eighth Amendment is intended to be applied only to punishment invoked as a sanction for criminal conduct. U.S.C.A. Const. Amend. 8.

**5. Criminal Law ⇐1213**

Scrutiny of propriety of physical force used by school teacher upon his or her students should be function of state

ty to pursue any remedy authorized by law. 45 CFR § 181.15(c).



court with its particular expertise in tort and criminal law questions, and the administration of corporal punishment in public schools, whether or not excessively administered, does not come within scope of Eighth Amendment protection. U.S.C.A. Const. Amend. 8.

#### 6. Schools and School Districts — 176

Record in Civil Rights action alleging that infliction of corporal punishment deprived students of liberty without due process of law supported finding that plaintiffs had not shown that the corporal punishment in concept or as authorized by the school board or as applied throughout the school system was arbitrary, capricious, or wholly unrelated to legitimate state purpose of determining its educational policy. U.S.C.A. Const. Amend. 14; West's F.S.A. § 232-27.

#### 7. Constitutional Law — 253(2)

Right to substantive due process is a guaranty against arbitrary legislation, demanding that the law not be unreasonable and that the means selected shall have a real and substantial relation to object sought to be obtained; test is whether there be a matter touching public interest which merits instant correction at hands of authorities and, if so, that remedy adopted by rule-making authority be reasonably calculated to correct it.

#### 8. Schools and School Districts — 169

Maintenance of discipline and order in public schools is a prerequisite to establishing most effective learning atmosphere and as such is a proper object for state and school board regulation.

#### 9. Constitutional Law — 253(2)

Corporal punishment of public school students as one of the means used to achieve an atmosphere which facilitates effective transmittal of knowledge does have a real and substantial relation to the object sought to be obtained and does not constitute a violation of substantive due process. U.S.C.A. Const. Amend. 14; West's F.S.A. § 232-27.

#### 10. Schools and School Districts — 176

Court having determined that corporal punishment itself and that corporal punishment as circumscribed by school board guidelines as set forth in its policy statement was not arbitrary, capricious or unrelated to legitimate educational goals refused to look at each individual instance of punishment to determine if it had been administered arbitrarily or capriciously, since to do so would be a misuse of judicial power; particularly in view of possibility of a civil or criminal action in state court against teacher who has excessively punished child. U.S.C.A. Const. Amend. 14; West's F.S.A. § 232-27.

#### 11. Constitutional Law — 253(2)

Concept of due process is premised on fairness and reasonableness in light of total circumstances.

#### 12. Constitutional Law — 253(2)

Infliction of a paddling does not subject public school child to a grievous loss for which Fourteenth Amendment due process standards should be applied. U.S.C.A. Const. Amend. 14.

#### 13. Courts — 96(3)

Lower courts are bound by summary decisions of United States Supreme Court until that Court informs them otherwise.

Alfred Feinberg, Miami, Fla., for plaintiffs-appellants.

Frank A. Howard, Jr., Thomas G. Spicer, James A. Smith, Miami, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, RIVES, GEWIN, BELL, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.\*

LEWIS R. MORGAN, Circuit Judge:

Plaintiffs James Ingraham and Roosevelt Andrews, two junior high school students in Dade County, Florida, filed a complaint containing three counts on January 7, 1971. Counts one and two were individual actions for compensatory and punitive damages brought under 42 U.S.C. §§ 1981-88, with jurisdiction claimed under 28 U.S.C. § 1331 and § 1343. Plaintiffs claimed that personal injuries resulted from corporal punishment administered by certain defendants in alleged violation of their constitutional rights, in particular their right to freedom from cruel and unusual punishment. Specifically, plaintiff Ingraham alleges in count one that on October 6, 1970, defendants Principal Wright and Assistant Principals Deliford and Barnes struck plaintiff repeatedly with a wooden instrument, injuring plaintiff and causing him to incur medical expenses. Plaintiff testified that this paddling was precipitated by his and several other children's disruption of a class over the objection of the teacher. Defendant Wright removed plaintiff and the other disruptive students to his office whereupon he paddled eight to ten of them. Wright had initially threatened plaintiff with five blows, but when the latter refused to assume a paddling position, Wright called on defendants Deliford and Barnes who held plaintiff in a prone position while Wright administered twenty blows. Plaintiff complained to his mother of discomfort following the paddling, whereupon he was taken to a hospital for treatment. Plaintiff introduced evidence that he had suffered a painful bruise that required the prescription of cold compresses, a laxative, sleeping and pain-killing pills and ten days of rest at home and that prevented him from sitting comfortably for three weeks.

Plaintiff Andrews alleges two incidents of corporal punishment as the basis for his claim for damages in count two of the complaint. Plaintiff alleges that on October 1, 1970, he, along with fifteen other boys, was spanked in the

boys' restroom by Assistant Principal Barnes. Plaintiff testified that he was taken by a teacher to Barnes for the offense of tardiness, but that he refused to submit to a paddling because, as he explained to Barnes, he had two minutes remaining to get to class when he was seized and was not, therefore, guilty of tardiness. Barnes rejected plaintiff's explanation and, when plaintiff resisted punishment, struck him on the arm, back, and across the neck.

Plaintiff Andrews was again spanked on October 20, 1970. Despite denials of guilt, plaintiff was paddled on the backside and on the wrist by defendant Wright in the presence of defendants Deliford and Barnes for having allegedly broken some glass in sheet metal class. As a result of this paddling, plaintiff visited a doctor and received pain pills for the discomfort, which lasted approximately a week.

Count three is a class action brought by plaintiffs Ingraham and Andrews as representatives of the class of students of the Dade County school system who are subject to the corporal punishment policies issued by defendant members of the Dade County School Board. This count seeks final injunctive and/or declaratory relief against the use of corporal punishment in the Dade County School System and can be divided into three constitutional arguments. First plaintiffs claim that infliction of corporal punishment on its face and as applied in the present case constitutes cruel and unusual punishment in that its application is grossly disproportionate to any misconduct in which plaintiffs may have engaged. Second, plaintiffs claim that because it is arbitrary, capricious and unrelated to achieving any legitimate educational goal, corporal punishment deprives all students of liberty without due process of law in violation of the Fourteenth Amendment. Plaintiffs also allege that the failure of defendants to promulgate a list of school regulations and corresponding punishments increases the capriciousness of the punishment. Finally, plaintiffs claim that defendants'

\* Circuit Judge Wisdom took no part in the consideration or decision of this case, en banc.



failure to provide any procedural safeguards before inflicting corporal punishment on students, including adequate notice of alleged misconduct, hearing, examination and cross-examination, representation and notice of rights, constitutes summary punishment and deprives students of liberty without due process of law in violation of the Fourteenth Amendment.

Plaintiffs presented their evidence in count three of the complaint in a week-long trial before the district court without a jury. At the close of plaintiffs' case, defendants moved for dismissal under Rule 41(b), F.R.Civ.P. which provides in part:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

By agreement of the parties the court considered the evidence offered to support count three as having been offered on counts one and two and as if upon motion for directed verdict for these two counts. The district court then dismissed count three of the complaint and, concluding that a jury could not lawfully find that either of the plaintiffs sustained a deprivation of constitutional

rights, likewise dismissed counts one and two.

### I. Jurisdiction.

[1, 2] Defendants assert that there is no federal jurisdiction over count three under 42 U.S.C. §§ 1981-1988 and 28 U.S.C. § 1331 and § 1343 because the Dade County School Board and the Superintendent of Schools, Edward L. Whigham, are not "persons" and hence are not amenable to suit. Defendants rely on *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), in which the Supreme Court held that a municipality was not a "person" within the meaning of § 1983. While it is well-settled that a school board is not a "person" and thus cannot be sued under § 1983, it is clear that a school superintendent is a "person" amenable to suit. *Sterzing v. Fort Bend Independent School District*, 496 F.2d 92, at 93, n. 2 (5th Cir. 1974). We, therefore, hold that jurisdiction was improperly granted against the Dade County School Board and, accordingly, that part of the complaint must be dismissed. Jurisdiction to proceed against Edward L. Whigham, Superintendent of Schools, was, however, properly granted.

### II. Cruel and Unusual Punishment.

[3] Plaintiff-appellants allege that the infliction of corporal punishment on public school children on its face, and as applied in the instant case, constitutes cruel and unusual punishment under the Eighth Amendment sufficient to entitle plaintiffs to damages and injunctive relief against the Dade County School Board under § 1983. We do not agree. It is the opinion of the majority of this court that the Eighth Amendment does not apply to the administration of discipline, through corporal punishment, to public school children by public school teachers and administrators.

[4] The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Not only the connotation of the words "bail,"

and "fine," but the legislative history<sup>1</sup> concerning enactment of the bill of rights supports an argument that the Eighth Amendment was intended to be applied only to punishment invoked as a sanction for criminal conduct.<sup>2</sup> Indeed, Supreme Court decisions which have interpreted the Amendment have focused on the inherent cruelty of penalties "inflicted by a judicial tribunal in accordance with law and retribution for criminal conduct." *Negrich v. Hohn*, 246 F.Supp. 173 (W.D.Pa.1965), affirmed on other grounds, 379 F.2d 213 (3rd Cir. 1967) (emphasis added). E. g., *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (death penalty as

cruel and unusual punishment); *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) (state's imprisonment of narcotics addict as cruel and unusual punishment); *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910) (disproportionate punishment of fifteen years to hard labor for conviction of strict liability offense as cruel and unusual punishment).

Although the Supreme Court has not yet discussed the applicability of the Eighth Amendment to corporal punishment administered in the public schools, a few lower courts have considered the issue and divided on its resolution.<sup>3</sup> We

1. The legislative history surrounding the enactment of the cruel and unusual clause indicates that it was intended to prevent the tortious and barbarous methods used in some European countries to extort confessions and to punish crimes. The following argument delivered in favor of the proposed "cruel and unusual clause" of the Bill of Rights indicates the intended limits of its scope:

[Congress will] have to ascertain, point out, and determine, what kinds of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard of punishments and annexing them to crimes; and there is no constitutional check of them, but that racks and gibbets may be amongst the most mild instruments of their discipline.

*Granucci, Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Cal.L.Rev. 839 at 841 (1969), quoting from 2 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 111 (2d Ed. 1881). (Emphasis added).

2. We are not persuaded by the majority's argument in the original panel decision that the Supreme Court decision in *Trop v. Dulles* requires a holding that the Eighth Amendment reaches the administration of corporal punishment in public schools:

It was succinctly stated in Vol. 6 Harv.Civ. Rights—Civ.Lib.L.Rev., *Corporal Punishment in the Public Schools*, p. 585, n. 24: "In *Trop v. Dulles*, 356 U.S. 86, 94-100 [78 S.Ct. 590, 2 L.Ed.2d 630] (1958), the Supreme Court, in applying the eighth amendment to all punishments inflicted pursuant to 'penal laws,' set forth two-tests to determine the meaning of penal. First, there must be the imposition of a 'disability for the purpose of punishment.' *Id.* at 96 [78 S.Ct. 590]. Second, there must be the pre-

scription of a 'consequence that will befall one who fails to abide by regulating provisions . . . .'*Id.* at 97 [78 S.Ct. 598].

"Infliction of corporal punishment by public school personnel meets both tests." *Ingraham v. Wright*, 498 F.2d 248, 259-60, n. 20 (5th Cir. 1974).

In *Trop v. Dulles*, the Supreme Court was addressing the constitutional propriety of § 401(g) of the Nationality Act of 1940 which provides for the loss of United States citizenship by a national who has deserted the military forces of the United States during a time of war and who has been convicted by court-martial. In setting up a "purpose" test to determine what is "penal" and what is thereby within the scope of the Eighth Amendment's prohibition against cruel and unusual punishment, the court was countering the government's argument that the statute was "non-penal" in that it provided for loss of citizenship as opposed to incarceration. 356 U.S. 96, 98-99, 78 S.Ct. 590, 2 L.Ed.2d 630, 641.

Yet, the court in *Trop v. Dulles* was still addressing the imposition of an essentially criminal sanction. The court several times refers to the desertion for which defendant was losing his citizenship, as a "crime;" e. g., 356 U.S. at 96, 78 S.Ct. 590, 2 L.Ed.2d at 640. In addition, denationalization under 401(g) could occur only after conviction by court-martial under 10 U.S.C. § 885, enacted August 10, 1956. The loss of citizenship found to be reached by the Eighth Amendment in *Trop* contains elements of criminal sanctions imposed by a judicial tribunal which are strikingly absent in the application of discipline in the public schools.

3. Decisions discussing the applicability of the Eighth Amendment to corporal punishment administered in the public schools can be classified into three groups: (1) case holding that the Eighth Amendment does apply to corporal



concur with the approach taken by the two district courts that have held the Eighth Amendment to be inapplicable to corporal punishment in public schools. In *Sims v. Waln*, *supra*, the court dismissed an action for damages and injunctive relief arising out of facts similar to those present in the instant case, stating:

Regarding the Eighth Amendment claim there is an initial distinction that must be made between criminal penalties and civil penalties. The distinction must be made because the *Eighth Amendment is not applicable in a civil context*. Concerning the Cruel and Unusual Punishment clause of the Eighth Amendment the Supreme Court has stated that: *'the primary purpose of that clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes . . .'* *Powell v. Texas*, 392 U.S. 514, 531-32, 88 S.Ct. 2145, 2154, 20 L.Ed.2d 1254 (1968). *Id.* at 549 (emphasis added).

Likewise, in *Gonyaw v. Gray*, *supra*, the district court of Vermont, in dismissing an action for damages and injunctive relief against a school board which imposed corporal punishment on its students, stated:

it is, of course, essential to recovery in both cases under § 1983 that the plaintiff establish an invasion

of federally protected constitutional rights . . . *Mere tortious conduct* does not constitute a deprivation of constitutional rights under this statute.

This statute [authorizing corporal punishment] does not offend the protection against cruel and unusual punishment since this amendment provides a limitation against penalties imposed for criminal behavior. . . . Since neither plaintiff was punished for an offense which was criminal in nature, the Eighth Amendment does not proscribe the conduct assigned to the defendants. *Id.* at 368 (emphasis added).<sup>4</sup>

In support of their argument that corporal punishment in a public school context is cruel and unusual punishment, appellants cite *Jackson v. Bishop*, 8 Cir. 1968, 404 F.2d 571 in which the Eighth Circuit Court of Appeals enjoined the use of a strap in prisons. We do not find prisons and public schools to be analogous in the context of Eighth Amendment coverage. As discussed, *supra*, the function of the Eighth Amendment's prohibition against cruel and unusual punishments was intended to prevent the imposition of unduly harsh penalties for criminal conduct. It is not an unreasonable interpretation of the Eighth Amendment to include within its coverage discipline imposed upon persons incarcerated for criminal conduct, since

(N.D.Ga.1971) (three judge court); and *Sims v. Board of Education*, 329 F.Supp. 678 (D.N.M. 1971).

4. The district court of Vermont has recently granted jurisdiction under 28 U.S.C. § 1343(3) to entertain a claim that administration of excessive corporal punishment violated the student-claimant's right to freedom from cruel and unusual punishment. *Roberts v. Way*, 398 F.Supp. 856 (D.Vt.1975). The court distinguished *Roberts* from *Gonyaw v. Gray*, *supra*, in which less severe punishment was alleged. The extent of the holding, however, was merely a finding that the claim was not so wholly insubstantial or frivolous as to divest the court of jurisdiction; the applicability of the Eighth Amendment to severe corporal punishment was not reached.

punishment in public schools—*Bramlett v. Wilson*, 495 F.2d 714 (8th Cir. 1974); (2) cases holding that the Eighth Amendment does not apply to corporal punishment in public schools—*Sims v. Waln*, 388 F.Supp. 543 (S.D. Ohio 1974), and *Gonyaw v. Gray*, 361 F.Supp. 305 (D.Vt.1973), and (3) cases that assume, without deciding, that the Eighth Amendment applies to imposition of corporal punishment in schools but that in instant case determine that punishment complained of was not severe enough to constitute cruel and unusual punishment—*Baker v. Owen*, 395 F.Supp. 294 (M.D. N.C.1975), *aff'd* — U.S. —, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975); *Glaser v. Manetta*, 351 F.Supp. 555 (W.D.Pa.1972); *Ware v. Estes*, 328 F.Supp. 857 (N.D.Tex.1971), *aff'd per curiam*, 458 F.2d 1360 (5th Cir. 1972); *Whitley v. Pike County Board of Education*, C.A. 977

such discipline is part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny. To extend the *Jackson* case from a prison context to a public school situation would, however, distort the intended scope of the Amendment.<sup>5</sup>

We do not mean to imply by our holding that we condone child abuse, either in the home or the schools. We abhor any exercise of discipline which could result in serious or permanent injury to the child. Indeed, if the force used by defendant teachers in disciplining plaintiff was as severe as plaintiffs allege, a Florida state court could find defendants civilly and criminally liable for tortious conduct exceeding the level of severity authorized by 232.27 of Fla.Stat. Ann. and by Dade County School Board policy 5144. The basis of such actions is, however, tort and criminal law, not federal constitutional law. We find it neither proper nor necessary to expand the Eighth Amendment beyond its intended and reasonable scope to encompass an action which is essentially based on the commission of a battery.

[5] In short, scrutiny of the propriety of physical force used by a school teacher upon his or her student should be the function of a state court, with its particular expertise in tort and criminal law questions; the administration of corporal punishment in public schools, whether or

not excessively administered, does not come within the scope of Eighth Amendment protection. Because the plaintiffs do not allege facts which could support a finding that defendants have deprived them of their right to freedom from cruel and unusual punishment, neither the legal action for damages included in counts one and two nor the equitable action for injunctive relief set out in count three can lie.

### III. Substantive Due Process.

Plaintiffs allege that "the infliction of corporal punishment on its face deprives all students as well as plaintiffs of 'liberty without due process of law' in violation of the Fourteenth Amendment to the United States Constitution since it is arbitrary, capricious, and unrelated to achieving any legitimate educational purpose." In essence, plaintiffs here allege a deprivation of their right to substantive due process, as this right to freedom from arbitrary governmental action has come to be known. We find this argument unpersuasive.

Statutory authority for the use of corporal punishment in Florida public schools is found by implication in § 232-27 of Fla.Stat. Ann. which provides:

Each teacher or other member of the staff of any school shall assume such authority for the control of pupils as may be assigned to him by the principal and shall keep good order in the

5. Even assuming that the Eighth Amendment was equally applicable to corporal punishment imposed by school authorities, we would not necessarily adopt the holding of the *Jackson* court that corporal punishment is per se cruel and unusual, since there are many practical differences between prisons and public schools that would tend to mitigate the use of such discipline in the latter institution. First, the *Jackson* court was concerned with the absence of safeguards necessary to prevent abuses in the imposition of corporal punishment by prison officials. The much greater access of school children through their parents to public opinion and to the political process, in addition to the natural restraint that generally exists when one strikes a child, deters excessive conduct by the school official administering corporal punishment. Also, central to the Jack-

son court's finding that use of a strap was cruel and unusual was its belief that such punishment, when imposed on prisoners, "offend[s] contemporary concepts of decency and human dignity." *Id.* at 579. While whipping an adult prisoner is sufficiently degrading to offend "contemporary concepts of decency," we cannot believe paddling a child, a long-accepted means of disciplining and inculcating concepts of obedience and responsibility, offends current notions of decency and human dignity. See also *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974) in which the court held that paddling of juveniles in a correctional institute constituted cruel and unusual punishment, but that corporal punishment administered in public schools could be upheld. *Id.* at 356.



classroom and in other places in which he is assigned to be in charge of pupils, but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unnecessarily severe in its nature. (Emphasis added.)

In addition the Dade County School Board Policy 5144, effective at the time plaintiff's cause of action arose, explicitly authorized corporal punishment, setting forth guidelines under which it was to be administered.<sup>6</sup>

[6-9] After reviewing the record, we agree with the district court's finding that "the evidence has not shown that corporal punishment in concept, or as authorized by the school board, or as applied throughout the school system, is arbitrary, capricious, or wholly unrelated to the legitimate state purpose of deter-

6. Policy 5144 provides in part:

II. Punishment: Corporal Punishment

Punishment in the general sense is the inflicting of a penalty for an offense. Corporal punishment is generally applied to the body of the offender or is physical punishment as opposed to other forms of punishment and is administered as a means of changing the behavior of the student. Therefore, it is important to analyze whether or not this goal will be accomplished by such action.

Corporal punishment may be used in the case where other means of seeking cooperation from the student have failed. If it appears that corporal punishment is likely to become necessary, the teacher must confer with the principal. The principal will determine the necessity for corporal punishment and designate the time, place, and the person to administer said punishment. In any case, the student should understand clearly the seriousness of the offense and the reason for the punishment. Care should be taken that the period of time between the offense and the punishment is not so long as to cause undue anxiety in the pupil. The punishment must be administered in kindness and in the presence of another adult, at a time and under conditions not calculated to hold the student up to ridicule or shame.

In the administering of corporal punishment, no instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck. The person

administering its educational policy." The plaintiffs' right to substantive due process is

a guaranty against arbitrary legislation, demanding that the law not be unreasonable and that the means selected shall have a real and substantial relation to the object sought to be attained. The test is whether there be a matter touching the public interest which merits instant correction at the hands of the authorities and, if so, that the remedy adopted by the rule-making authorities be reasonably calculated to correct it. *Sims v. Board of Education, supra*, at 684.

Certainly, maintenance of discipline and order in public schools is a prerequisite to establishing the most effective learning atmosphere and as such is a proper object for state and school board regulation.<sup>7</sup> Without the existence of discipli-

administering the corporal punishment must realize his own personal liabilities if the student being given corporal punishment is physically injured.

Corporal punishment should never be administered to a student whom school personnel know to be under psychological or medical treatment unless there has been a pre-conference with the school psychologist or the physician.

Policy 5144 was revised extensively, effective November 3, 1971, almost ten months after this action was filed. The revision sets a maximal limit on the number of strokes which can be applied (five for elementary school children and seven for junior and senior high school children), requires punishment to be administered "posteriorly" and in no case about the head and shoulders, emphasizes consideration of the seriousness of the offense in determining the proper punishment, and requires a recording of the infraction which justified the punishment.

7. See *Sims v. Waln*, 388 F.Supp. 543 (S.D. Ohio 1975), in which the court stated:

A teacher is responsible for the discipline in his school, and for the progress, conduct, and deportment of his pupils. It is his duty to maintain good order and to require of his pupils a faithful performance of their duties. To enable him to discharge such a duty effectively, he must have the power to enforce prompt obedience to his lawful commands. For this reason, in proper cases, he may inflict corporal punishment on refractory pupils. *Id.* at 546.

nary sanctions for misbehavior, students who desire to learn would be deprived of their right to an education by the more disruptive members of their class. We are unwilling to hold that corporal punishment, as one of the means used to achieve an atmosphere which facilitates the effective transmittal of knowledge, has no "real and substantial relation to the object sought to be attained."

[10] Certainly the guidelines set down in Policy 5144 establish standards which tend to eliminate arbitrary or capricious elements in any decision to punish. Having determined that corporal punishment itself and corporal punishment as circumscribed by the guidelines in Policy 5144 is not arbitrary, capricious, or unrelated to legitimate educational goals, we refused to look at each individual instance of punishment to determine if it has been administered arbitrarily or capriciously. We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child.<sup>8</sup>

We emphasize that it is not this court's duty to judge the wisdom of particular school regulations governing matters of internal discipline. Only if the regulation bears no reasonable relation to the legitimate end of maintaining an atmosphere conducive to learning can it be held to violate the substantive provision of the due process laws. Paddling of recalcitrant children has long been an accepted method of promoting good behavior and instilling notions of responsibility and decorum into the mischievous heads of school children. We do not here overrule it.

8. Indeed, Policy 5144, as effective during 1970-71, provides in part: "The person administering the corporal punishment must realize

IV. Procedural Due Process.

Plaintiffs also allege as part of their claim for injunctive and declaratory relief that defendants have deprived the class which plaintiffs represent of its right to procedural due process. Plaintiffs argue that procedural due process requires (1) that a schedule of school regulations and punishments to be accorded for their breach be established; (2) that notice be given to the student of the offense for which he is to be punished, and (3) that a hearing with opportunity for examination and cross-examination and with a right to counsel be accorded before punishment is inflicted.

[11, 12] The concept of due process is premised upon fairness and reasonableness in light of the totality of circumstances. *Hannah v. Larcht*, 363 U.S. 420, 80 S.Ct. 1502, 4 L.Ed.2d 1307 (1960); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S.Ct. 624, 95 L.Ed. 817 (1951). "[W]hether any protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'" *Joint Anti-Fascist Refugee Committee v. McGrath, supra*, at 168, 71 S.Ct. at 646 (Frankfurter, J., concurring), quoted in *Morrissey v. Brewer*, 408 U.S. 471, at 481, 92 S.Ct. 2593, at 2600, 33 L.Ed.2d 484 (1972) (emphasis added). We do not believe that infliction of a paddling subjects a schoolchild to a grievous loss for which Fourteenth Amendment due process standards should be applied.

[13] In its argument for procedural safeguards, the dissent relies on *Baker v. Owen, supra*, a three-judge district court judgment summarily affirmed by the Supreme Court. In *Baker*, the three-judge district court upheld a North Carolina statute authorizing corporal punishment against plaintiffs' argument that the constitutional concept of familial privacy bars school officials from spanking school children over parental objection. In addition, the court set forth certain

his own personal liabilities if the student being given corporal punishment is physically injured."



procedural requirements to accompany the administration of corporal punishment. The Supreme Court's affirmance of this three-judge district court judgment was a summary affirmance without opinion. The appeal of that lower court judgment was brought only by the plaintiffs and the only question presented to the Supreme Court was whether parental objection could bar the use of corporal punishment by school officials; defendant state and school officials did not appeal that part of the judgment requiring procedural safeguards. Accordingly, the three-judge district court's pronouncement on procedural requirements was never before the Court and, therefore, its summary affirmance of that lower court's judgment does not bind us to a part of the judgment not appealed.<sup>9</sup>

In holding that procedural safeguards accompanying the use of corporal punishment in public schools are not constitutionally mandated, we are cognizant of the Supreme Court's holding in *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42

L.Ed.2d 725 (1975), that an Ohio statute authorizing suspension of public school students without notice of the offense for which suspended and without opportunity for a hearing violates students' rights to procedural due process. The basis for the Court's holding that due process should have been afforded plaintiffs was its determination that education was a substantial property interest that the State of Ohio had conferred on plaintiffs and "having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct absent fundamentally fair procedures . . . ." *Id.*, 419 U.S. at 574, 95 S.Ct. at 736, 42 L.Ed.2d at 734.<sup>10</sup> Noting that a recorded suspension could harm a student's reputation and interfere with later opportunities for higher education and employment, the Court also held that a student's "liberty" interest in maintaining his good name and reputation could not be arbitrarily deprived by a suspension unattended by proper procedures. We believe that there is an important distinction in

9. While the Supreme Court has held that lower courts are bound by summary decisions of the Supreme Court until that Court informs them otherwise, *Hicks v. Miranda*, — U.S. —, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975), we believe that *Hicks* can be readily distinguished from the present case. In *Hicks*, the Supreme Court was dealing with the precedential value of a dismissal for want of a substantial federal question; in its holding that such a dismissal carried the same impact as a disposition on the merits, the Court was countering the argument that the precedential value of a dismissal was equivalent only to that of a denial of certiorari. The Court's holding certainly cannot be interpreted to mean that a summary affirmance by the Supreme Court of a lower court judgment is binding on questions not presented to that Court on appeal. See, *Swarb v. Lennox*, 405 U.S. 191, 92 S.Ct. 767, 31 L.Ed.2d 138 (1972) (Supreme Court's affirmance of District Court judgment insofar as it refused to declare a state's statute unconstitutional does not constitute approval of other aspects and details not before Supreme Court where no cross appeal taken by defendant).

10. In applying the "grievous loss" standard, discussed *supra*, to the present facts we are not ignoring the "de minimus" test employed in *Goss* in which the court stated: "Whether

due process requirements apply in the first place, we must look not to the "weight" but to the nature of the interest at stake." *Board of Regents v. Roth*, 408 U.S. [564], at 570-71, 92 S.Ct. [2701] at 2705-2706, 33 L.Ed.2d 348.

The Court's view has long been that as long as a property deprivation is not de minimus, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." *Id.* 419 U.S. at 575, 95 S.Ct. at 737, 42 L.Ed.2d at 735. In so holding, the court was responding to an argument that because a ten-day suspension did not subject a student to a grievous loss, the due process clause did not come into play. Thus, according to the court's reasoning, because total exclusion from the educational process is itself a substantial interest to be protected by the due process clause, the shortness of that period of exclusion cannot suspend the guarantee of procedural safeguards. There is a qualitative difference between an exclusion from the educational process, through suspension, and a routine disciplinary measure such as paddling. The infliction of a paddling, unlike the denial itself of educational benefits, does not subject the student to a "grievous loss" for which constitutionally mandated procedural safeguards apply.

terms of the applicability of due process standards between a suspension, which involves an exclusion from the educational process itself, and a paddling, which involves no deprivation of a property interest or denial of a claim to education and which is certainly a much less serious event in the life of a child than is a suspension or an expulsion.<sup>11</sup> Likewise, we find no substantial interest in reputation violated by a paddling, for while a recorded suspension can indeed have a permanent adverse impact on a person's reputation and could conceivably harm that person's chance to obtain employment or higher education, we find it difficult to contend that a paddling, a commonplace and trivial event in the lives of most children, involves any such damage to reputation.

It seems to us that the value of corporal punishment would be severely diluted by elaborate procedural process imposed by this court.<sup>12</sup> To require, for example, a published schedule of infractions for which corporal punishment is authorized, would serve to remove a valid judgmental aspect from a decision which should properly be left to the experienced administrator. Likewise, a hearing procedure could effectively undermine the utility of corporal punishment for the administrator who probably has little time under present procedures to handle all the disciplinary problems which beset him or her. "[T]o hold that the relationship between parents, pupils, and school officials must be conducted in an adverse atmosphere and according to procedural rules by which we are accustomed in a court of law would hardly best serve the interest of any of those involved." *Whitley v. Pike County Board of Educa-*

*tion, supra*. "The likelihood of the abuse of corporal punishment is minimized by the participation of parents and school boards in school affairs, and by the availability of civil and criminal sanctions against teachers who exceed the limits of moderation. In any event, it is a sanction which simply is not serious enough to require the prerequisite of a formal hearing." *Gonyaw v. Gray, supra*, at 371.

In essence, we refuse to set forth, as constitutionally mandated, procedural standards for an activity which is not substantial enough, on a constitutional level, to justify the time and effort which would have to be expended by the school in adhering to these procedures or to justify further interference by federal courts into the internal affairs of public schools. If a paddling of a school child subjects him to a "grievous loss" sufficient to require constitutional procedural safeguards under the Fourteenth Amendment, then conceivably a teacher's decision to keep a disobedient child after school or to give a child a failing grade in a course would inflict just as grievous a loss and would require procedures which meet constitutional standards. We do not interpret the due process clause of the Fourteenth Amendment so broadly. In so holding, we are mindful of the oft-quoted statement made by Justice Fortas in *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968), in which he asserted:

Judicial interposition in the operation of the public school systems of the nation raises problems requiring care and restraint. . . . By and large, public education in our nation is committed to the control of state and local

11. Indeed, this court has often recognized the applicability of the due process clause to expulsions and suspensions. E.g., *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961) (due process applicable to a removal for long enough duration to be classified as expulsion); *Black Students of North Fort Myers Jr.-Sr. High School v. Williams*, 470 F.2d 957 (5th Cir. 1972) (due process applicable to a ten-day suspension).

12. Dade County School Board Policy 5144 does contain guidelines by which corporal punishment is to be administered. It requires, for example, that the "student understand clearly the seriousness of the offense and the reason for the punishment." If the Policy guidelines are not followed, students would have redress to the School Board.



authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. *Id.* at 104, 89 S.Ct. at 270, 21 L.Ed.2d at 234.

Affirmed.

GEWIN, Circuit Judge (concurring in the result).

Although I am in full agreement with the majority's resolution of the merits of this case, it is my considered judgment that the jurisdictional statement in the opinion is not in accord with recent decisions of our court. Accordingly, I concur in the majority's affirmance of the district court's dismissal of the complaint, but do not fully agree with the jurisdictional statement.

The majority is quite correct in its conclusion that school boards are often considered to be either arms of or in the nature of municipalities. Hence, under the "non-person" rule of *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), school boards as entities are not subject to suit under § 1983<sup>1</sup> and its jurisdictional statute, § 1343.<sup>2</sup> Likewise, the majority opinion is equally correct in its conclusion that a school superintendent is a "person" liable to suit under § 1983.

However, I disagree with the majority's indication that merely because

§ 1983 jurisdiction over the school board in this case does not exist, there is a lack of jurisdiction in every case involving school boards. We have recently held<sup>3</sup> that, despite the fact that § 1983 jurisdiction over a school board may not be present in a given instance, jurisdiction may be proper under § 1331.<sup>4</sup>

Since I agree with the majority that appellants have not asserted a constitutional claim for relief,<sup>5</sup> the dismissal was proper because § 1331 is of no aid in the absence of such a claim. I do not agree that the mere failure to state a § 1983 claim automatically defeats federal jurisdiction under § 1331.

GODBOLD, Circuit Judge, with whom BROWN, Chief Judge, joins (dissenting):

I agree with Judge Rives that arbitrary and excessive corporal punishment is a denial of substantive due process, although I am not convinced that the punishment in this case rose to the level of such a violation. I, therefore, disagree with the majority's statement that it would be an abuse of our judicial power to determine whether punishment inflicted in a particular case exceeds constitutional limits. This is a mere rule of convenience, made palatable by characterizing the issue as the difference between five and ten licks. I doubt that the majority really means what it says, and I suspect that if in a future case the punishment inflicted has broken the vic-

*g., Lansdale v. Tyler Junior College*, 470 F.2d 659 (5th Cir. 1972) (en banc) (potential college students not allowed to register because of hair length), cert. denied, 411 U.S. 948, 93 S.Ct. 2268, 36 L.Ed.2d 964 (1973), certainly we must have scrupulous regard for principles of federalism in extending the reach of "constitutional common law." See generally Monaghan, *Constitutional Common Law*, 89 Harv.L. Rev. 1, 45 (1975) ("The general guarantees of due process and equal protection are so indeterminate in character that to develop on their authority a body of subconstitutional law would be to go beyond implementation to recognize a judicial power to create a sub-order of liberties without any ascertainable constitutional reference points") (emphasis in original).

1. 42 U.S.C. § 1983.

2. 28 U.S.C. § 1343.

3. *E.g., Roane v. Callisburg Independent School District*, 511 F.2d 633, 635 n.1 (5th Cir. 1975) (citations omitted); *Kelly v. West Baton Rouge Parish School Board*, 517 F.2d 194, 197 (5th Cir. 1975) (citations omitted). Other circuits have utilized the same rationale in holding that *Kenosha* does not bar § 1331 jurisdiction over a municipality, *Brault v. Town of Milton*, — F.2d — (2d Cir. 1975) [No. —, Feb. 24, 1975], or a county, *Cox v. Stanton* (4th Cir. 1975) [No. —, Oct. 6, 1975].

4. 28 U.S.C. § 1331.

5. Although we have not hesitated to find due process and equal protection violations in a variety of circumstances involving schools, *e.*

tim's leg we will face the issue and hold that substantive due process has been violated.

RIVES, Circuit Judge, with whom GOLDBERG and AINSWORTH, Circuit Judges, join (dissenting):

With deference to the en banc majority, I adhere to the original majority opinion and decision reported as *Ingraham v. Wright*, 5 Cir. 1974, 498 F.2d 248, and make a few additional comments. The district court's "Findings of Fact" were quoted in the original opinion at 498 F.2d 253, 254, and the facts were more fully detailed at 498 F.2d 254-258. At the close of the plaintiffs' case the district court dismissed all three counts, holding as to Count Three, the class action, that the plaintiffs had shown no right to relief, and as to Counts One and Two that a jury could not lawfully find that either James Ingraham or Roosevelt Andrews had sustained a deprivation of federal constitutional rights. The en banc court now affirms. On original hearing we reversed and remanded for further proceedings. Reconsidering the law and the undisputed facts, I remain convinced that our original decision is right.

#### I. *Baker v. Owen*.

In the present case the panel's majority opinion and Judge Morgan's dissenting opinion were entered on July 29, 1974 (498 F.2d 248). Since then another case involving the corporal punishment of a sixth grader, *Russell Carl Baker*, has been heard by a three-judge District Court of the Middle District of North Carolina on January 13, 1975, opinion entered April 23, 1975, judgment entered June 13, 1975, and on appeal judgment affirmed by the Supreme Court on October 15, 1975. *Baker v. Owen*, M.D.N.C. 1975, 395 F.Supp. 294, *aff'd* — U.S. —, 96 S.Ct. 210, 46 L.Ed.2d 137. The Supreme Court did not leave to implication but ordered in express terms that "the judgment is affirmed." (Emphasis added.) The judgment of the three-judge district court, entered nearly two months

after the entry of its opinion, was not included in the report of the opinion. The judgment reads as follows:

"Now, therefore, consistent with the amended opinion it is ORDERED, ADJUDGED, AND DECREED that:

"1. North Carolina General Statute § 115-146, on its fact, is declared not to be in violation of the Constitution of the United States.

"2. Defendants, their agents and servants, and their successors, are permanently enjoined in the administration of corporal punishment in the public schools of the State of North Carolina to conform to the minimal due process requirements of the Fourteenth Amendment as follows:

"(a) Except for those acts of misconduct which are so anti-social or disruptive in nature as to shock the conscience, corporal punishment may never be used unless the student was informed beforehand that specific misbehavior could occasion its use, and, subject to this exception, it should never be employed as a first line of punishment for misbehavior. The requirements of an announced possibility of corporal punishment and an attempt to modify behavior by some other means—keeping after school, assigning extra work, or some other punishment—will insure that the child has clear notice that certain behavior subjects him to physical punishment.

"(b) A teacher or principal may punish corporally only in the presence of a second school official (teacher or principal), who must be informed beforehand and in the student's presence of the reason for the punishment. The student need not be afforded a formal opportunity to present his side to the second official; this requirement is intended only to allow a student to protest, spontaneously, an egregiously arbitrary or contrived application of punishment.



"(c) An official who has administered such punishment must provide the child's parent, upon request, a written explanation of his reasons and the name of the second official who was present.

The above minimal due process requirements are not intended to prevent or dissuade the state from further elaboration upon necessary requirements in order to accomplish fairness in administration.

"3. The parties shall bear their own costs."

As to paragraph numbered 1 of the judgment, the opinion at 395 F.Supp. 303 shows that the plaintiffs made no claim "that corporal punishment *per se* violates the eighth amendment prohibition of unusual punishment"; that "His teacher, a female, administered two licks to his buttocks with a wooden drawer divider . . ." and that

"In short, this record does not begin to present a picture of punishment comparable to that in *Ingraham, supra* [5 Cir. 1974, 498 F.2d 248], at 255-59, or in *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), which we believe indicate the kinds of beatings that could constitute cruel and unusual punishment if the eighth amendment is indeed applicable." 395 F.Supp. at 303.

The district court posed, but did not decide the issue of whether the Eighth Amendment applies to the corporal punishment of school children. 395 F.Supp. at 303.

As to paragraph numbered 2 of the judgment, the district court's opinion made clear the substantive due process constitutional right which made it necessary to inquire as to the type of procedure to be employed:

"The initial inquiry must be whether Russell Carl has a liberty or property interest, greater than *de minimis*, in freedom from corporal punishment such that the fourteenth amendment requires some procedural safeguards against its arbitrary imposition. Only if such an interest is found must we

proceed to an inquiry as to the type of procedure to be employed. See generally *Goss v. Lopez, supra*, 419 U.S. [565] at 574, 95 S.Ct. 723 [1975]; *Board of Regents v. Roth*, 408 U.S. 564, 570-71, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969) (Harlan, J., concurring).

"We believe that Russell Carl does have an interest, protected by the concept of liberty in the fourteenth amendment, in avoiding corporal punishment. This conclusion is compelled by a conflux of many premises and postulates.

"Having concluded, upon due consideration of all the above factors, that North Carolina school children have a liberty interest, we must decide what procedural safeguards should protect it." 395 F.Supp. at 301, 302.

Relevant to the present appeal, the Supreme Court in affirming the judgment of the district court held that so long as the force used is reasonable, corporal punishment does not violate the Eighth Amendment. It left undecided the issue of whether the Eighth Amendment applies to the corporal punishment of school children.

Acknowledging my indebtedness to Judge Morgan for calling to my attention that only the plaintiffs appealed to the Supreme Court and that no appeal was taken from paragraph 2 of the judgment, I agree that the Supreme Court's affirmance of the judgment did not bind this Court as to paragraph 2. Nonetheless, I submit that paragraph 2 was correctly decided by the district court for the reasons well stated in its opinion.

Some further discussion of the several issues seems warranted.

## II. Cruel and Unusual Punishment.

The en banc majority holds that the cruel and unusual punishment clause of the Eighth Amendment has no application to corporal punishment administered to public school children by teachers or

administrators regardless of the circumstances or the severity of the punishment. I agree with the contrary holding of the Eighth Circuit in *Bramlet v. Wilson*, 1974, 495 F.2d 714, 717, for the reasons stated in footnote 20 to the original opinion, 498 F.2d at 259, 260.

The en banc majority makes brief reference to the legislative history of the Eighth Amendment. That history is sketchy and inconclusive at best. The first ten amendments were proposed to the legislatures of the several states by the First Congress on September 25, 1789, and were ratified December 15, 1791.

In *Brown v. Board of Education*, 1954, 347 U.S. 483, at 489, 490, 74 S.Ct. 686, 98 L.Ed. 873, the Supreme Court discussed the history of the Fourteenth Amendment with respect to segregated schools as of the time of the adoption of that Amendment in 1868. The rationale of that discussion applies with multiplied intensity to the history of the Eighth Amendment as of 1791 with respect to corporal punishment in the public schools. As the *Brown* opinion demonstrates, public education was in its infancy in 1868. In 1791 it was almost nonexistent.<sup>1</sup> Chief Justice Warren, writing for a unanimous Court in *Brown*, said:

"In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* [163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256] was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws." 347 U.S. at 492-493, 74 S.Ct. at 691.

Similarly, in *Trop v. Dulles*, 1958, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d

630, with specific reference to the constitutional phrase "cruel and unusual" as used in the Eighth Amendment, Chief Justice Warren said: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

In *Nelson v. Heyne*, 7 Cir. 1974, 491 F.2d 352, cert. denied 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146, that expression was quoted and applied by the Seventh Circuit to a "[s]chool, located in Plainfield, Indiana [which] is a medium security state correctional institution for boys twelve to eighteen years of age, an estimated one-third of whom are non-criminal offenders." 491 F.2d at 353, 354 (emphasis added). The Seventh Circuit held that corporal punishment consisting of beating juveniles with a fraternity paddle, causing painful injuries, was cruel and unusual punishment. While it recognized that the school was both a correctional and an academic institution (491 F.2d at 354), it did not exclude from its holding the "non-criminal offenders."

It is likely that in 1791 the federal government meted out punishment solely in retribution for crimes. The scope of the Amendment was greatly expanded after it became binding on the states through the Fourteenth Amendment. *Louisiana ex rel. Francis v. Resweber*, 1947, 329 U.S. 459, 463; *Robinson v. California*, 1962, 370 U.S. 660, 666, 82 S.Ct. 1417, 8 L.Ed.2d 758. The Seventh Circuit in *Nelson v. Heyne, supra*, aptly called attention that,

"In *re Gault*, 387 U.S. 1, 15-16, 87 S.Ct. 1428, 1437, 18 L.Ed.2d 527 (1967), the Court stated:

"The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. . . . The child was

1. At the time of the American Revolution, schools were predominantly private and denominational. 7 *Encyclopedia Britannica*, History of Education 991 (1970). The main out-

lines of the public educational system were not achieved until the middle of the Nineteenth Century. *Id.* at 992.



to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive."

491 F.2d at 358.

Thus it is not surprising that there should be so little in the history of the Eighth Amendment relating to its intended effect on corporal punishment in the public schools. Today, government has greatly expanded and provides a multitude of social institutions and public services. The administration of punishment is no longer confined to a criminal setting. It is now employed in public schools, see *Bramlet v. Wilson, supra*; homes for delinquents, see *Nelson v. Heyne, supra*, *Morales v. Turman*, E.D. Tex.1974, 383 F.Supp. 53, 70-72, and *Collins v. Bensinger*, N.D.Ill.1974, 374 F.Supp. 273; mental institutions, see *Welsch v. Likins*, D.Minn.1974, 373 F.Supp. 487; and even in processing passport applications, see *Trop v. Dulles, supra*, 356 U.S. at 88, 78 S.Ct. 590. To paraphrase from Chief Justice Warren in *Brown, supra*, 347 U.S. at 492, 74 S.Ct. 686, in approaching this problem, we cannot turn the clock back to 1791.

The majority's other objection to applying the cruel and unusual punishment clause of the Eighth Amendment to this case appears to be one of federalism:

"... if the force used by defendant teachers in disciplining plaintiff was as severe as plaintiffs allege, a Florida state court could find defendants civilly and criminally liable for tortious conduct exceeding the level of severity authorized by 232.27 of Fla.Stat. Ann. and by Dade County School Board policy 5144. The basis of such actions is, however, tort and criminal law, not federal constitutional law. We find it neither proper nor necessary to expand the Eighth Amendment beyond its intended and reasonable scope to encompass an action which is essentially based on the commission of a battery." 525 F.2d 915.

It has been the province and duty of the federal courts since *Marbury v. Madison*, 1803, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60, to interpret the Constitution and protect constitutional rights. The presence of alternative remedies in state courts should not deter federal judges from their primary duty of defending and supporting the Constitution. Cf. *Monroe v. Pape*, 1961, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492. The claims for relief here involved were brought by plaintiffs under 42 U.S.C. § 1983, which derives from the Civil Rights Act of 1871. In the landmark case construing § 1983, *Monroe v. Pape, supra*, the complaint alleged, *inter alia*, that thirteen Chicago police officers broke into the plaintiffs' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. 365 U.S. at 169, 81 S.Ct. 473. Like the corporal punishment in our present case, these acts were, among other tortious conduct, "essentially based on the commission of a battery." The possibility of criminal law proceedings and tort claims against these policemen in state court was found to be no answer, as the federal remedy provided by § 1983 is supplementary to any state remedy. *Id.* at 183, 81 S.Ct. 473. On that score, *Monroe v. Pape, supra*, was followed by *McNeese v. Board of Education*, 1963, 373 U.S. 668, 671, 672, 83 S.Ct. 1433, 10 L.Ed.2d 622, and by many decisions of the courts of appeals and of the district courts, some of which are collected in 42 U.S.C. § 1983 n. 500. I cannot escape the conclusion that these school children have a constitutional right to freedom from cruel and unusual punishment when applied under color of state law, and that it is our duty as federal judges to enforce that right.

### III. Substantive Due Process.

The district court found that "alternative measures in use range from parent and student conferences, the use of guidance counselors and psychologists, where available, to suspension and ex-

pulsion." (498 F.2d at 264. See also footnote 32 which follows.) In the original panel majority opinion, we noted that,

"The defendants apparently concede that corporal punishment in Dade County is a relatively serious punishment. In their brief they state that 'Corporal punishment in the public schools of Dade County, Florida, is a last resort means of discipline as an alternative to suspension or expulsion \* \* \*' (Defendants' Brief, p. 17.)" 498 F.2d at 267.

The administration of cruel and severe corporal punishment can never be justified. The circumstances and severity of the beatings disclosed by the presently undisputed evidence amounted to arbitrary and capricious conduct unrelated to the achievement of any legitimate educational purpose. Such conduct, exercised under color of state law, deprived the plaintiffs of both property and liberty without due process of law.

I submit that the en banc majority errs in the following part of its opinion:

"Having determined that corporal punishment itself and corporal punishment as circumscribed by the guidelines in Policy 5144 is not arbitrary, capricious, or unrelated to legitimate educational goals, we refuse to look at each individual instance of punishment to determine if it has been administered arbitrarily or capriciously. We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child."

"Indeed, Policy 5144, as effective during 1970-71, provides in part: 'The person administering the corporal punishment must realize his own personal liabilities if the student being given corporal punishment is physically injured.'"

525 F.2d p. 917. That is in effect to hold that corporal punishment more severe than that "circumscribed" by the Florida Statute § 232.27 and by Dade County School Board Policy 5144 is not done under color of state law. Obviously the conduct of public school teachers or administrators purportedly exercised under authority granted by a state statute and school board regulation is not excluded from federal constitutional scrutiny simply because the severity of the beatings exceeded the prescription of the state law. That is implicitly, if not expressly, held in *Baker v. Owen, supra*. See also *Jackson v. Bishop*, 8 Cir. 1968, 404 F.2d 571, 579, 581, discussed in the original panel opinion at 498 F.2d 261, 262 n. 26. In *United States v. Classic*, 1941, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368, a criminal action against Louisiana election officials for falsifying election returns, the Supreme Court held that defendants were acting under color of state law when they falsified the returns. These acts, the Court found, were committed "in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election." 313 U.S. at 325-326, 61 S.Ct. at 1042-1043. The Court further stated that:

"Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law. [Citations omitted.] *Id.* at 326, 61 S.Ct. at 1043.

In *Monroe v. Pape, supra*, this definitional view of the words "under color of" was adopted for the civil rights action provided by 42 U.S.C. § 1983. 365 U.S. at 184, 185, 61 S.Ct. 1031. Clearly, the teachers and administrators who administered the spankings in this case did so under color of state law. The fact that they might have misused the power vested in them by the state to administer corporal punishment by inflicting more blows and blows more severe than prescribed does not alter the basic fact that



these beatings were performed by officials clothed with state authority.

*Monroe v. Pape, supra*, in discussing the legislative history of the Civil Rights Act which gave birth to 42 U.S.C. § 1983, commented:

"... the remedy created was not a remedy against it [the Ku Klux Klan] or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law.

"There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty." (Emphasis that of the Court.) 365 U.S. at 175-176, 81 S.Ct. at 478.

Likewise, in the present case, there is no quarrel with the restrictions on the severity of corporal punishment expressed in the Florida Statute 232.27 and those stated in the Board Policy 5144. "It was their lack of enforcement that was the nub of the difficulty." 365 U.S. at 176, 81 S.Ct. at 478. The district court found that

"There has been a rather widespread failure to adhere to School Board policy regarding corporal punishment. Teachers have punished students without first consulting with their respective principals. More blows have been administered to students than authorized by the policy." 498 F.2d at 254.

The original panel properly deemed it "more important to know how corporal punishment is actually administered than to know the relevant rules or regulations." 498 F.2d at 261. The en banc majority would separate sharply the moderate kind of corporal punishment authorized by the Florida Statute and the Board Policy from the severe beatings administered to the plaintiffs Roosevelt Andrews and James Ingraham and to a few other students.

2. Four times the five licks held to constitute cruel and unusual punishment in *Nelson v. Heyne, supra*, 491 F.2d at 354.

The original panel recognized the difficulty, or perhaps impossibility, of controlling the severity of corporal punishment (498 F.2d at 261, 262 n. 26). I submit that the arbitrary, excessive and severe corporal punishment disclosed by the plaintiffs' evidence, thus far undisputed, amounts to a denial of substantive due process of law.

#### IV. Procedural Due Process.

In the light of the district court's opinion in *Baker v. Owen, supra*, it seems clear that the plaintiffs have been denied procedural due process. The circumstances and severity of the beatings disclosed by the plaintiffs' evidence were such as to require the basic right to a hearing of some kind under either the "severe and grievous" or the "de minimis" test. The two tests were contrasted in the latest Supreme Court pronouncement on procedural due process, *Goss v. Lopez*, 1975, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725, and the de minimis test was adopted, "that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." 419 U.S. at 576, 95 S.Ct. at 737. (citations omitted).

In the present posture of this case, the undisputed evidence discloses much more than a de minimis deprivation of property rights. It shows deprivations of liberty, probability of severe psychological and physical injury, punishment of persons who were protesting their innocence, punishment for no offense whatever, punishment far more severe than warranted by the gravity of the offense, and all without the slightest notice or opportunity for any kind of hearing. Repetition from a few examples should suffice. James Ingraham claimed that he was innocent and refused to be paddled. Principal Wright administered at least twenty licks,<sup>2</sup> while Assistant Principals Deliford and Barnes held James by his arms and legs and placed him strug-

Cite as 525 F.2d 927 (1976)

gling face down across a table. "The district court found that James Ingraham 'received 20 licks with a wooden paddle, which produced a painful and serious hematoma on his buttocks.' (R. 1561)." 498 F.2d at 256 n. 10. "On October 14, eight days after the paddling, this doctor indicated that James should rest at home 'for next 72 hours.' James testified that it was painful even to lie on his back in the days following the paddling, and that he could not sit comfortably for about three weeks (Tr. 149)." 498 F.2d at 256. Was James' loss of more than 10 days from school any less a deprivation of property because it resulted from a beating instead of a formal suspension?

Roosevelt Andrews' numerous paddlings were for offenses no more serious than being late or not "dressing out" (498 F.2d at 256). Roosevelt on one occasion insisted that he was innocent and refused to bend over. Barnes pushed him against the urinals and hit him on his arm, back and neck. Roosevelt complained to Principal Wright, but to no avail (498 F.2d 257).

Daniel Lee was struck four or five times on the hand for no offense whatever. His hand was X-rayed and, according to Daniel, a bone in his right hand was found to be fractured. The district judge observed an enlargement of his right knuckle (498 F.2d 258). Other instances of violation of procedural due process are set out in 498 F.2d at 258, 259. The brutal facts of this case should not be swept under the rug. Clearly, according to the presently undisputed evidence, the plaintiffs have been subjected to cruel and unusual punishment. Under color of state law, they have been arbitrarily deprived of both property and liberty. Even more clearly, they have been denied procedural due process.

The precedent to be set by the en banc majority is that school children have no federal constitutional rights which protect them from cruel and severe beatings administered under color of state law,

without any kind of hearing, for the slightest offense or for no offense whatsoever. I strongly disagree and respectfully dissent.



Ruby CONWAY et al.,  
Plaintiffs-Appellees,

v.

CHEMICAL LEAMAN TANK LINES,  
INC., Defendant-Appellant,

The Fidelity & Casualty Company of  
New York, Intervenor-Appellee.

No. 74-2856.

United States Court of Appeals,  
Fifth Circuit.

Jan. 7, 1976.

Diversity action, was brought for wrongful death by the widow, sons and employer of deceased. The United States District Court for the Eastern District of Texas, at Beaumont, Joe J. Fisher, Chief Judge, entered judgment against defendant, which appealed. The Court of Appeals, Gee, Circuit Judge, held that in view of Texas statute, evidence of surviving spouse's ceremonial remarriage was admissible and its exclusion was not harmless; on retrial case would be tried under the Federal Rules of Evidence under which the evidence would still be admissible although jury could not consider the same, under Texas law, for purpose of mitigating damages.

Affirmed in part and reversed and remanded in part.

1. Courts — 376

Texas Supreme Court's decision on applicability of Texas statute relating to admission of evidence of a ceremonial

**CORRECTED COPY**

**Supreme Court, U. S.  
FILED**

**SEP 24 1976**

**MICHAEL ROBAK, JR., CLERK**

**APPENDIX**

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***In the Supreme Court of the United States***

**OCTOBER TERM, 1976**

—————  
**No. 75-6527**  
—————

**JAMES INGRAHAM, BY HIS MOTHER AND NEXT FRIEND, ELOISE  
INGRAHAM, ET AL., PETITIONERS**

***v.***

**WILLIE J. WRIGHT, I, ET AL., RESPONDENTS**

—————  
***ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF  
APPEALS FOR THE FIFTH CIRCUIT***

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**PETITION FOR CERTIORARI FILED APRIL 6, 1976  
CERTIORARI GRANTED MAY 24, 1976**



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United States District Court, Southern District of Florida

RELEVANT DOCKET ENTRIES

<i>Date</i>	<i>Item</i>
<i>1971</i>	
Jan. 7	Complaint
Feb. 8	Answer
July 15	Motion to determine class
Aug. 10	Denial of motion to determine class, without prejudice to later move to alter this determination
<i>1972</i>	
May 16	Order defining class
Oct. 16	Non-jury trial commenced
17	Non-jury trial resumed and continued
18	Non-jury trial resumed
<i>1973</i>	
Feb. 23	Order of dismissal
Mar. 13	Notice of appeal

(11)

In the United States District Court in and for the Southern District of Florida

(Case No. 71-23)

ELOISE INGRAHAM AS NEXT FRIEND AND MOTHER OF JAMES INGRAHAM, A MINOR, AND WILLIE EVERETT AS NEXT FRIEND AND FATHER OF ROOSEVELT ANDREWS, A MINOR, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,  
PLAINTIFFS

vs.

WILLIE J. WRIGHT, I, INDIVIDUALLY AND AS PRINCIPAL OF CHARLES R. DREW JUNIOR HIGH SCHOOL, LEMMIE DELIFORD, INDIVIDUALLY AND AS ASSISTANT PRINCIPAL FOR ADMINISTRATION AT CHARLES R. DREW JUNIOR HIGH SCHOOL, SOLOMON BARNES, INDIVIDUALLY AND AS ASSISTANT TO THE PRINCIPAL OF CHARLES R. DREW JUNIOR HIGH SCHOOL, EDWARD L. WHIGHAM, INDIVIDUALLY AND AS SUPERINTENDENT OF THE DADE COUNTY SCHOOL SYSTEM AND THE DADE COUNTY SCHOOL BOARD, DEFENDANTS

*Complaint*

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331 and 1343. This action arises under the First, Fourth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, and 42 U.S.C. §§ 1981-1988. The matter in controversy exceeds the sum of \$10,000 exclusive of interest and costs, and the action seeks damages and both injunctive and declaratory relief pursuant to 42 U.S.C. §§ 1981-1988 and 28 U.S.C. §§ 2201 and 2202, respectively.

2. Plaintiff, JAMES INGRAHAM, Jr., is a fourteen year old eighth grade student at Charles H. Drew Junior High School located in Miami, Dade County, Florida.

3. Plaintiff, ROOSEVELT ANDREWS, is a fifteen year old ninth grade student at Charles R. Drew Junior High School.

(1)



4. Defendant, WILLIE J. WRIGHT, I, is the Principal of Charles R. Drew Junior High School having commenced his principalship during the September 1970 school term.

5. Defendant, LEMMIE DELIFORD, is Assistant Principal for Administration at Charles R. Drew Junior High School.

6. Defendant, SOLOMON BARNES, is Assistant to the Principal of Charles R. Drew Junior High School.

7. Defendant, DADE COUNTY SCHOOL BOARD, is a body corporate charged with responsibility of establishing, organizing and operating the Dade County school system. Pursuant to F.S. §§ 231.09(3), 232.25, 232.26 and 232.27, defendant, the DADE COUNTY SCHOOL BOARD, promulgated its policy No. 5144 (attached hereto and made a part hereof as Exhibit A) relating to the use of corporal punishment as a means of behavioral control in the public schools of Dade County, Florida.

8. Defendant, EDWARD L. WHIGHAM, is the Superintendent and highest administrative officer in the Dade County school system.

9. In September 1970, or shortly prior thereto, defendants, WRIGHT, DELIFORD, BARNES, and, upon information and belief, WHIGHAM (and/or the latter's agents, servants or employees) conspired to initiate and did initiate a harsh, arbitrary, inflexible and brutal corporal punishment policy calculated to create an atmosphere of dread, fear and anxiety at Charles R. Drew Junior High School for the ostensible purpose of maintaining discipline and order.

10. Pursuant to the tactics of terror conceived in September 1970, defendants, WRIGHT, DELIFORD and BARNES, have engaged in a pattern and practice of indiscriminate threats, assaults and beatings upon students at Charles R. Drew Junior High School. These punitive measures are often and regularly administered:

a. For the least infraction or appearance of wrong doing without any prior proceeding to determine whether or not the student has in fact engaged in wrongful conduct or whether there were any mitigating factors which should be taken into account before administering punishment; i.e., without any semblance of procedural due process of law.

b. Without first seeking other means of regulating or controlling the behavior of the alleged wrong doer.

c. Without first conferring with the victim's teacher or other persons who may have had personal knowledge of the alleged wrongful behavior.

d. In surroundings calculated to embarrass, demean and degrade the victim, e.g., the boys bathroom, the school hallways.

e. In the presence of other students, calculated to embarrass the victim and hold him up to shame and ridicule by his peer group.

f. With a hard wooden instrument calculated to produce physical injury.

g. Without the personal prior knowledge and approval of defendant WRIGHT, but pursuant to authority delegated by him to defendants, BARNES and DELIFORD.

h. By parading through the hallways and classrooms, while classes are in session, carrying a large wooden weapon in a threatening manner.

i. Without adult witnesses present other than the person administering the punishment.

j. With vindictiveness.

11. Upon information and belief, the defendant WHIGHAM and/or his agents and employees in the administrative hierarchy of the Dade County school system have knowingly lent their tacit or explicit support and approval to the methods of discipline and behavioral control described herein.

#### FIRST CAUSE OF ACTION

12. On or about October 6, 1970, at Charles R. Drew Junior High School, defendants, WRIGHT, DELIFORD and BARNES, under color of state law, conspired to administer an unprovoked and unjustified beating and assault upon plaintiff INGRAHAM.

13. On or about October 6, 1970, at Charles R. Drew Junior High School, the aforesaid defendants, WRIGHT, DELIFORD and BARNES, while holding plaintiff in an embarrassing and immobile position, did there and then strike him repeatedly and violently with a wooden instrument.

14. When plaintiff INGRAHAM thereafter attempted to leave Charles R. Drew Junior High School to minister to his

wounds defendant WRIGHT threatened him with further physical injury to be administered to plaintiff INGRAHAM's head.

15. As a direct and proximate result of the beating administered to him, plaintiff INGRAHAM was injured in and about his body, suffered pain and emotional upset, embarrassment and anxiety therefrom, incurred medical expenses and treatment of such injuries, suffered physical handicap to the extent that his normal abilities as a youth and student were impaired; said injuries are either permanent or continuing in their nature, and plaintiff INGRAHAM will suffer such losses and impairment in the future.

#### SECOND CAUSE OF ACTION

16. On or about October 1, 1970, plaintiff ROOSEVELT ANDREWS was among approximately fifteen students each of whom was beaten in the presence of the others by defendant BARNES with a wooden instrument in the boys bathroom of Charles R. Drew Junior High School. No adult witnesses were present during the beatings which were severe enough to cause virtually all of the victims to cry out in pain. Plaintiff ANDREWS was struck by defendant BARNES on the back, legs, buttocks and arms. The blows were administered with such force as to propel plaintiff ANDREWS forward, causing him to strike the bridge of his nose on a protruding bathroom fixture. The beating received by plaintiff ANDREWS was unprovoked and unjustified, and was administered without the prior knowledge or approval of the defendant WRIGHT.

17. Subsequent to the beating on October 1, 1970 and prior to October 20, 1970, plaintiff ANDREWS' father and next friend, WILLIE EVERETT, informed defendant DELIFORD that he did not approve of the corporal punishment method of discipline as administered by school officials to his son and that such officials should thereafter refrain from assaulting, beating or otherwise physically injuring plaintiff ANDREWS.

18. On or about October 20, 1970, despite WILLIE EVERETT's instructions to the contrary, defendant WRIGHT, in the presence of both defendants BARNES and DELIFORD, struck plaintiff ANDREWS numerous and repeated times with a wooden implement.

19. As a direct and proximate result of the beating administered to him, plaintiff ANDREWS was injured in and about his body, suffered pain and emotional embarrassment and anxiety therefrom, incurred medical expenses and treatment of such injuries, suffered physical handicap to the extent that his normal abilities as a youth and student were impaired.

#### THIRD CAUSE OF ACTION

20. This is a class action authorized by Rule 23 of the Federal Rules of Civil Procedure. The class which plaintiffs represent are all students of the Dade County school system who are subject to the corporal punishment policies issued by the defendant, DADE COUNTY SCHOOL BOARD. The class is so numerous as to make joinder of all members thereof impracticable. Defendants have acted on grounds generally applicable to the class thereby making appropriate final injunctive relief and/or corresponding declaratory relief with respect to the class. There are questions of law and fact common to the members of the class. Plaintiffs will protect and represent the interests of the class.

21. The defendants have promulgated no list of school regulations or standards of conduct, violation of which will result in corporal punishment. There is no schedule of maximum punishments. As a result, students have no notice of what offense will result in corporal punishment or of the amount of punishment which they can expect. Indeed, punishment appears to be imposed haphazardly and according to whim and caprice. Identical offenses are corporally punished or not, and/or are corporally punished with degrees of severity, apparently according to the mood of the school official. The regulations thus provide for punishment of limitless, undefined crimes, by limitless, undefined punishments. Such regulations permit and even encourage widely disparate treatment of identical situations and conduct.

22. The infliction of corporal punishment by public school officials on students on its face abridges the "privileges and immunities" of all such students, as well as the plaintiffs on the facts of the within action, including their *rights* to physical integrity, dignity of personality, and freedom from arbitrary



authority in violation of the Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

23. The infliction of corporal punishment on its face deprives all students as well as plaintiffs on the facts of the within action of "liberty without due process of law" in violation of the Fourteenth Amendment to the United States Constitution since it is arbitrary, capricious and unrelated to achieving any legitimate educational purposes. On the contrary, the use of corporal punishment in the schools results in a hostile reaction to authority, breeds further violence and interferes with the educational process and academic inquiry.

24. The infliction of corporal punishment on public school students on its face, and as applied in the instant case, constitutes "cruel and unusual punishment" since its application is grossly disproportionate to any misconduct plaintiffs may have engaged in, in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

25. Defendants' failure to provide students with any procedural safeguards before inflicting corporal punishment on them, including adequate notice of alleged misconduct, hearing, examination and cross-examination, representation and notice of rights constitutes summary punishment and deprives students of "liberty without due process of law" in violation of the Fourteenth Amendment to the United States Constitution.

26. As a direct and proximate result of defendants' conduct in executing, permitting and/or failing to prevent the inflicting of corporal punishment pursuant to the standards adopted by the defendants to govern the inflicting of corporal punishment, plaintiffs-students have been deprived of their rights under the Constitution of the United States for the reasons stated in paragraphs 22 and 25 above.

27. Defendants' past and continuing infliction of corporal punishment on plaintiffs and members of their class has caused and continues to cause them great and irreparable injury by greatly damaging their education, causing them severe and permanent physical and emotional injury, violating their physical integrity, and destroying their dignity of personality. Further defendants' past and continuing infliction of corporal punishment on plaintiffs and members of their class will irreparably injure their fundamental constitutional rights to be free from arbitrary and capricious governmental action and

will irreparably injure the public's interest in insuring its fundamental laws are obeyed by government.

28. Plaintiffs have no adequate remedy at law to prevent the continued implementation of the corporal punishment policy of the defendants which will continue to cause and threaten to cause irreparable injury to the plaintiffs and the members of their class unless enjoined by this Court.

WHEREFORE, and for the foregoing reasons, plaintiffs respectfully pray as follows:

a. That the Court assume jurisdiction of this cause pursuant to 28 U.S.C. § § 1331 and 1343.

b. That the Court will enter an Order determining the class to be all students of the Dade County school system subject to the corporal punishment policies of the defendants.

c. That the Court will enter a Temporary Restraining Order, a Preliminary Injunction and a Permanent Injunction enjoining and restraining the defendants, their agents, servants and employees from inflicting any form of corporal punishment upon any student at Charles R. Drew Junior High School.

d. That the Court will enter a declaratory judgment declaring that the corporal punishment policy of the defendants' Policy No. 5144 contravenes the First, Fourth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

e. That the Court will enter a declaratory judgment declaring that any form of corporal punishment imposed on students in the Dade County school is unconstitutional under the First, Fourth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

f. That the Court will issue a Permanent Injunction enjoining and restraining the defendants, their agents, servants and employees from inflicting any form of corporal punishment upon any student in the Dade County school system.

g. That judgment be entered against the defendants jointly and severally in both their individual and representative capacities in an amount in excess of \$50,000 as to each named plaintiff as compensatory and punitive damages, plus interest and costs.

h. For such other relief as the Court deems just and proper. Plaintiffs demand jury trial for all matters triable by jury as a matter of right.

Respectfully submitted,

BRUCE S. ROGOW, Esq.,

WILKIE D. FERGUSON, Esq.,

ALFRED FEINBERG, Esq.,

*Economic Opportunity Legal Services Program, Inc.,*

*395 N.W. First Street,*

*Miami, Florida 33128.*

RICHARD HAMAR, Esq.,

*4844 N.W. Seventh Avenue,*

*Miami, Florida 33127.*

*Attorneys for Plaintiffs.*

By Alfred Feinberg,

ALFRED FEINBERG, Esq.,

#### EXHIBIT A.—ELEMENTARY AND SECONDARY

#### Discipline/Punishment: Corporal Punishment

##### I. DISCIPLINE

Successful learning is contingent upon the self-discipline of the students as well as upon the group discipline which supports the learning climate.

Student infractions of rules and departures from good behavior should be studied, and corrective action should be taken as a result of identification of reasons for improper behavior before punishment is invoked. The only exception to this logical process is in the case of erratic behavior of a student which may affect the safety of himself or others. At this point, it is necessary to act immediately and probe for causal reasons as soon as possible. A study of individual differences, conference with the pupil and parent, and assistance from the principal, pupil personnel and other school resource specialists may aid the teacher in attempting to help a student correct behavior patterns which are retarding his development or interfering with the rights of others. The principal may also suggest seeking assistance from other resources in the school district offices or in the community.

A teacher or principal stands substantially in loco parentis with the child; that, coupled with the authority set forth in *Florida Statutes*, vests them with the power to establish rules for discipline, develop understandings for the enforcement of obedience, and, as a concomitant, power to enforce the classroom regulations.

##### II. PUNISHMENT: CORPORAL PUNISHMENT

Punishment in the general sense is the infliction of a penalty for an offense. Corporal punishment is generally applied to the body of the offender or is physical punishment as opposed to other forms of punishment and is administered as a means of changing the behavior of the student. Therefore, it is important to analyze whether or not this goal will be accomplished by such action.

Corporal punishment may be used in the case where other means of seeking cooperation from the student have failed. If it appears that corporal punishment is likely to become necessary, the teacher must confer with the principal. The principal will determine the necessity for corporal punishment and designate the time, place, and the person to administer said punishment. In any case, the student should understand clearly the seriousness of the offense and the reason for the punishment. Care should be taken that the period of time between the offense and the punishment is not so long as to cause undue anxiety in the pupil. The punishment must be administered in kindness and in the presence of another adult, at a time and under conditions not calculated to hold the student up to ridicule or shame.

In the administering of corporal punishment, no instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck. The person administering the corporal punishment must realize his own personal liabilities if the student being given corporal punishment is physically injured.

Corporal punishment should never be administered to a student whom school personnel know to be under psychological or medical treatment unless there has been a pre-conference with the school psychologist or the physician.

(See also Regulation 5150, Control of Student Behavior.)

Legal Reference: *Florida Statutes*, 231.09(3), 232.25, 232.26 and 232.27.



[Filed, February 8, 1971, Joseph I. Bogard, Clerk, U.S. Dist. Ct., Southern Dist. of Fla., Miami, Fla.]

In the United States District Court in and for the Southern District of Florida, Miami Division

(No. 71-23-Civ-JE)

ELOISE INGRAHAM, ET AL., PLAINTIFFS

vs.

WILLIE J. WRIGHT, ET AL., DEFENDANTS

*Answer*

COME NOW the Defendants, by and through their undersigned attorneys, and for answer to the Complaint herein state as follows:

(1) Defendants deny each and every allegation set forth in Paragraphs 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, and 20 of the Complaint.

(2) Defendants admit that they have promulgated no list of school regulations, violation of which will result in corporal punishment. Except as so admitted, Defendants deny the allegations of Paragraph 21 of the Complaint.

(3) Defendants deny the allegations of Paragraphs 22, 23, 24, 25, 26, 27 and 28.

WHEREFORE, Defendants pray that the above styled action be dismissed with costs to the Defendants and that such other and further relief as may be just and proper may be granted.

DATED this 5 day of February, 1971.

BOLLES, GOODWIN, RYSKAMP & WARE,

*Attorneys for Defendants,*

*1410 N.E. Second Avenue,*

*Miami, Florida 33132.*

By James T. Schoenbrod

JAMES T. SCHOENBROD,

*Of Counsel.*

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer was mailed to ALFRED FEINBERG, ESQ., Attorney for Plaintiffs, Legal Services Program,

Inc., 395 N.W. First Street, Room 202, Miami, Florida, this 5 day of February, 1971.

James T. Schoenbrod.

EXHIBIT "A".—MEMORANDUM

AUGUST 19, 1970.

TO: All Teachers.

FROM: Willie J. Wright, I, Principal, Charles R. Drew, Junior High School.

RE BOARD POLICY NO. 5114 "SUSPENSION, EXPULSION AND EXCLUSION", BOARD POLICY NO. 5144 "DISCIPLINE/PUNISHMENT: CORPORAL PUNISHMENT", BOARD POLICY NO. 5150 "CONTROL OF STUDENT BEHAVIOR", BOARD POLICY NO. 5132 "DRESS".

ELEMENTARY AND SECONDARY

SUSPENSION, EXPULSION, AND EXCLUSION

Suspension or expulsion of a pupil from the public schools has very serious consequences for that student in view of the increasing significance that society places upon education. A student cannot be deprived of his education without due process of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America. Attendance at the public school does not signify a waiver of the student's constitutional rights. It is essential that school administrators be aware that upon initiating disciplinary proceedings against a pupil, they must proceed in a fixed order. A fair hearing procedure must be afforded to the pupil in any type of action which may result in suspension or expulsion.

Suspension and expulsion are measures to be employed only after all available school and support services have been considered, or when school personnel are unable to cope constructively with pupil misconduct, or where conditions, including emergency conditions, require immediate suspension. Suspension from school may be authorized by the principal and the Superintendent of Schools for a short period of time. Expulsion from the school requires action of the Dade County School Board to effect and rescind the status.

Expulsion from the regular program of the Dade County Public Schools is defined as expulsion from the normal kindergarten through twelfth-grade (K-12) program; and expulsion from the Dade County Public Schools is defined as expulsion from the normal kindergarten through twelfth-grade (K-12) program and all other programs offered by the Dade County Public Schools.

#### PRINCIPAL'S AUTHORITY

The principal shall have the authority to:

1. Suspend a pupil from school for a period of not more than ten school days on any one suspension for any breach of the school's established conduct code or for any reason provided by state law.
2. Recommend to the Superintendent of Schools, with the approval of the appropriate district superintendent. That the pupil's suspension:
  - a) be extended by the Superintendent of Schools up to an additional 30 school days.
  - b) be extended by the Superintendent of Schools up to an additional 30 school days and that the Dade County School Board expel permanently or for a lesser period of time. A recommendation for expulsion shall be in a written narrative form.

The extent of the school administrator's authority in specific situations remains a matter of interpretation of the inherent function of his office and of the guidelines laid down by the State Legislature and the Dade County School Board.

#### SUPERINTENDENT'S AUTHORITY

The Superintendent of Schools shall have the authority to:

1. Extend a principal's suspension of a pupil up to an additional 30 school days, and to assign any pupil so suspended to an individually designated program or other special placement.
2. Recommend to the Board that a pupil be expelled permanently or for a lesser period of time.
3. Recommend assignment of a pupil to be expelled from his regular school to an individually designated program or to other special placement.

#### EXPULSION BY THE DADE COUNTY SCHOOL BOARD

Any pupil subject to the control of the school shall be subject to expulsion by the School Board upon the recommendation of the Superintendent of Schools when the pupil has:

1. Possessed, used, handled, or transmitted a substance capable of modifying mood and/ behavior.
2. Possessed, used, handled, or transmitted a weapon including, but not limited to, a gun, knife, razor, explosives, ice pick, club, or paddle.
3. Used any article as a weapon or in a manner reasonably calculated to threaten any person.
4. Committed a serious breach of conduct including, but not limited to, an assault on school personnel or on another pupil, a lewd or lascivious act, arson, vandalism, or any other act which disrupt or tends to disrupt the orderly conduct of the school or school activity.
5. Engaged in less serious but continuing misconduct including, but not limited to, the use of profane, obscene, or abusive language, or other acts that are detrimental to the educational function of the school. Any expulsion recommendation based on such misconduct shall include a documented report by the principal on the corrective measures taken prior to his recommendation of expulsion.

#### PUPIL EXPULSION HEARING PROCEDURES

The following procedures will be observed when the Superintendent of Schools recommends a pupil for expulsion:

The Superintendent of Schools shall, by certified mail or by hand delivery by an appropriate staff member, notify the pupil's parents or guardian of school record that he is recommending that their child be expelled from the Dade County Public Schools. This letter shall set forth the charges against the student and advise the parent or guardian that he has five days in which to request a hearing on those charges before a hearing examiner.

Should the parent or guardian not request a hearing within the specified time, the Board shall act upon the Superintendent's recommendation at the first available Board meeting. Said recommendation shall set forth a brief statement of the pupil's act or acts which warrant expulsion.



Should the pupil's parent request a hearing, the hearing shall be conducted before one of the hearing examiners appointed by the Dade County School Board and shall be conducted under the rules and procedures for administrative hearings adopted by Board Resolution 63-19. (See Regulation 4119.5.)

#### EXCLUSION: RELEASE FROM COMPULSORY SCHOOL ATTENDANCE

Certificates of exemption for children under 16 years of age are authorized under certain cases. Students within the compulsory attendance age limits may be issued valid certificates of exemption by the Superintendent, exempting them from attending school for one of the following reasons:

1. Physical and mental disturbance
2. Distance exemption
3. Employment exemption
4. Judicial exemption

A certificate of exemption shall cease to be valid at the end of the school year in which it is issued.

#### DISCIPLINE/PUNISHMENT: CORPORAL PUNISHMENT

##### *I. Discipline*

Successful learning is contingent upon the self-discipline of the student as well as upon the group discipline which supports the learning climate.

Student infractions of rules and departures from good behavior should be studied, and corrective action should be taken as a result of identification of reasons for improper behavior before punishment is invoked. The only exception to this logical process is in the case of erratic behavior of a student which may affect the safety of himself or others. At this point, it is necessary to act immediately and probe for causal reasons as soon as possible. A study of individual differences, conferences with the pupil and parent, and assistance from the principal, pupil personnel and other school resource specialists may aid the teacher in attempting to help a student correct behavior patterns which are retarding his development or interfering with the rights of others. The principal may also suggest seeking assistance from other resources in the school district offices or in the community.

A teacher or principal stands substantially in loco parentis with the child; that, coupled with the authority set forth in

*Florida Statutes*, vests them with the power to establish rules for discipline, develop understandings for the enforcement of obedience, and, as a concomitant, power to enforce the classroom regulations.

##### *II. Punishment: Corporal Punishment*

Punishment in the general sense is the inflicting of a penalty for an offense. Corporal punishment is generally applied to the body of the offender or is physical punishment as opposed to other forms of punishment and is administered as a means of changing the behavior of the student. Therefore, it is important to analyze whether or not this goal will be accomplished by such action.

Corporal punishment may be used in the case where other means of seeking cooperation from the student have failed. If it appears that corporal punishment is likely to become necessary, the teacher must confer with the principal. The principal will determine the necessity for corporal punishment and designate the time, place, and the person to administer said punishment. In any case, the student should understand clearly the seriousness of the offense and the reason for the punishment. Care should be taken that the period of time between the offense and the punishment must be administered in kindness and in the presence of another adult, at a time and under conditions not calculated to hold the student up to ridicule or shame.

In the administering of corporal punishment, no instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck. The person administering the corporal punishment must realize his own personal liabilities if the student being given corporal punishment is physically injured.

Corporal punishment should never be administered to a student whom school personnel know to be under psychological or medical treatment unless there has been a pre-conference with the school psychologist or the physician.

#### CONTROL OF STUDENT BEHAVIOR

The schools are established for the benefit of all students. The educational purposes of the schools are accomplished best in a climate of student behavior which is socially acceptable and conducive to the learning and teaching process. Student behav-

ior which disrupts this process or which infringes upon the rights of other individuals will not be tolerated.

The School Board reaffirms its support of the administrative staff and teachers in taking all necessary steps to enforce and implement all Board policies and regulations pertaining to control of student behavior. Important among these policies are those in the areas of conduct, corporal punishment, suspensions and expulsions, and climate for learning.

The School Board directs that:

1. The Superintendent, through the Security Department, shall pursue the investigation and assist in the subsequent prosecution of any adults inciting students to perform violent and unlawful acts in the schools; and

2. That each individual teacher shall be granted full disciplinary authority over every student in his classroom, in accordance with Florida Statutes, Board Policies and Regulations, and administrative regulations.

#### DRESS

The principal of each school shall provide leadership and direction in developing regulations relating to dress and behavior for the students in his school.

Cleanliness, personal appearance, and proper dress are important in setting the pattern of school and social conduct. There is considerable evidence to indicate a close relationship between pupil dress and pupil behavior. The standards of dress for school should conform to the standards generally accepted by the community. The administration is encouraged to invite staff, students, and parents to participate in setting up acceptable minimum standards for student dress.

Students who come to school without proper attention having been given to personal cleanliness or neatness of dress may be sent home to be properly prepared for school, or shall be required to prepare themselves for the schoolroom before entering.

Students should not wear clothing or hair styles that can be hazardous to them in their school activities, such as shop, lab work, physical education, and art. Grooming and dress which prevent the student from doing his best work because of blocked vision or restricted movement should be discouraged, as should dress styles that create, or are likely to create, a disruption of

classroom order. Articles of clothing which cause excessive maintenance problems of school property are unacceptable.

United States District Court, Southern District of Florida

(Case Number 71-23-CIV-JE)

ELOISE INGRAHAM, ET AL., PLAINTIFFS

vs.

WILLIE J. WRIGHT, ET AL., DEFENDANTS

#### Order

THIS CAUSE is before the Court on Plaintiffs' Motion to Compel Discovery filed September 30th, 1971; Plaintiff' Renewed Motion to Determine the Class; and Plaintiffs' Renewed Motion to Produce Income Tax Returns, etc. The Court has considered the motions and the record in the cause. Therefore, it is

ORDERED and ADJUDGED that:

1. Plaintiffs' Motion to Compel Discovery filed September 30th, 1971 is granted. Defendants shall provide Plaintiffs with the requested documents, by mail, within ten days from the date of this Order, said documents to be copied by Plaintiffs and returned to Defendants by mail.

2. Plaintiffs' third cause of action of the Complaint is determined to be a class action under Rule 23(b)(2) and pursuant to Rule 23(c)(1), the members of the class are determined to be as follows: "All students of the Dade County School system who are subject to the corporal punishment policies issued by the Defendant, Dade County School Board, with the exception of Miss Karen Grumwell, who specifically requested that she not be made a part of the class."

3. Plaintiffs' Renewed Motion to Produce Income Tax Returns and a Statement of Net Worth of Defendants Wright, Deliford and Barnes is granted to the extent that same shall be produced to the Court.

DONE and ORDERED at Miami, in the Southern District of Florida this 16th day of May, 1972.

JOE EATON,  
United States District Judge.



In the United States District Court in and for the Southern  
District of Florida

(Case No. 71-23-Civ-JE)

ELOISE INGRAHAM, ET AL., PLAINTIFFS

vs.

WILLIE J. WRIGHT, I., ET AL., DEFENDANTS

*Stipulation*

Pursuant to the Court's suggestion, the parties through their undersigned counsel do hereby Stipulate and agree that the following summaries of the anticipated testimony of Dr. Fernando Milanes and Dr. Carlos Gamez would constitute the sum and substance of their testimony which Plaintiffs intend to offer into evidence in support of Plaintiffs' first cause of action. Taken together with all of the evidence introduced by Plaintiffs in support of Plaintiffs' third cause of action, the testimony of Drs. Milanes and Gamez constitutes all of the evidence which Plaintiffs would offer in their case in chief in support of Plaintiffs' first and second causes of action. Defendants stipulate to the summaries of testimony set forth below without conceding the truth or falsity of said testimony.

ANTICIPATED TESTIMONY OF DR. FERNANDO MILANES

1. Dr. Fernando Milanes would testify that he practices medicine at the Veterans Administration Hospital, 1201 N. W. 16th Street. His home address is 8970 S. W. 56th Terrace. Dr. Milanes is not in private practice. He passed the Florida State Medical Boards in March, 1971 and is a member of the Dade County Medical Association, the Florida Medical Association, and the American Medical Association. From November 1, 1969 to October 31, 1970 Dr. Milanes interned in Family Medicine at Jackson Memorial Hospital. He is currently engaged in psychiatric residency and as of September 7, 1972 was Chief Resident in Psychiatry at the Veterans Administration Hospital.

2. Dr. Milanes would testify that on October 6, 1970 during the period of his internship he examined JAMES INGRAHAM

in the emergency room—primary care unit of Jackson Memorial Hospital. His testimony will show that JAMES INGRAHAM complained of pain to his buttocks and that Dr. Milanes, upon examining JAMES INGRAHAM's buttocks diagnosed the cause of the pain to be a hematoma.

3. Dr. Milanes' testimony will show that the area of pain was tender and large in size and that the temperature of the skin area of the hematoma was above normal which is a sign of inflammation often associated with hematoma.

4. The hematoma Dr. Milanes observed is consistent with a blow or a number of blows from a flat object administered to the buttocks.

5. Due to the injury caused to JAMES INGRAHAM's buttocks Dr. Milanes, will testify that he wrote a note excusing JAMES INGRAHAM from participation in Physical Education classes at school.

ANTICIPATED TESTIMONY OF DR. CARLOS GAMEZ

6. Dr. Carlos Gamez will testify that he passed the Florida State Medical Boards approximately one and one-half years ago. His specialty is Family Medicine and at the time he examined JAMES INGRAHAM he was a second year resident in his specialty at Jackson Memorial Hospital and at the Family Health Center. At the present time Dr. Gamez has offices at 1707 Coral Way.

7. Dr. Gamez will testify he examined JAMES INGRAHAM on October 9, 1970 at Jackson Memorial Hospital and again on October 14, 1970 at the Family Health Center. The patient's subjective signs of injury included a hematoma approximately six inches in diameter which was swollen, tender, and purplish in color. Additionally, there was serousness or fluid oozing from the hematoma.

8. The patient complained of pain to his buttocks and stated that he had been beaten with a paddle at school a number of times.

9. In Dr. Gamez' opinion the wound which he observed on the patient's buttocks is consistent with, or likely to have been caused by a number of forceful blows with a wooden instrument or paddle. Furthermore, the hematoma which was observed was likely to have been painful. It is Dr. Gamez' opinion that the observable injury, including the pain, would have likely persisted for approximately one week.

## STIPULATION

The parties, by and through their undersigned counsel, do hereby stipulate as hereinabove set forth that the testimony summarized above would be the testimony of Drs. Milanes and Gamez respectively.

ALFRED FEINBERG,

*Attorney for Plaintiffs, Legal Services of Greater Miami, Inc., 395 Northwest First Street, Suite 202, Miami, Florida 33128, Telephone—379-0822.*

LELAND STANSELL,

*Attorney for Defendants, Wright and Deliford, 10th Floor, Biscayne Bldg., Miami, Florida 33130.*

FRANK HOWARD,

*Attorney for Defendants, Wright, Deliford, Barnes, Whigham, and the Dade County Board of Public Instruction, 1410 NE. Second Avenue, Miami, Florida.*

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail upon Frank Howard, Attorney for Defendants, Wright, Deliford, Barnes, Whigham, and the Dade County Board of Public Instruction, 1414 N.E. Second Avenue, Miami, Florida, Leland Stansell, Attorney for Defendants Wright and Deliford, 10th Floor, Biscayne Building, Miami, Florida 33130 this 29 day of January, 1973.

ALFRED FEINBERG,

*Attorney for Plaintiffs.*

In the District Court of the United States for the Southern District of Florida

No. 71-23-Civ-JE

ELOISE INGRAHAM, ET AL., PLAINTIFFS

vs.

WILLIE WRIGHT, ET AL., DEFENDANTS

[7] Mr. FEINBERG.

DIRECT EXAMINATION BY MR. FEINBERG:

Q. Please state your name and address.

A. Edward L. Whigham, 1339 Coral Way, Coral Gables.

Q. Please state your occupation, sir.

A. Superintendent of the Dade County Public Schools.

Q. How long have you been employed in that position?

A. I am beginning my fourth year.

Q. Beginning your fourth year as superintendent?

A. Yes.

[8-13]

[14] Q. In theory, any student who committed any infraction of School Board policy in the school, he is not made to receive, or be, corporally punished; is that correct?

A. Yes; although I would say, here again, that it would depend on the specific circumstances involved.

[Mr. Feinberg continues reading:]

Q. It is possible that any student, no matter how minor the violation, would be corporally punished, based on the sound judgment of the principal; is that correct?

A. Yes; referring to that hypothetical situation.

Q. There is no list of infractions that will result in corporal punishment, as opposed to the other forms of punishment?

A. No.



Q. There are no means, in advance, of determining what was to be corporal punishment, as opposed to the other means?

A. No; there is no established—

Mr. FEINBERG. Page 19, Line 5:

Q. Is it not conceivable that two students [15] who have violated exactly the same rule in the same way and the same manner, can receive different forms of punishment?

A. If you are asking, there again, a hypothetical question.

Q. That's right.

A. This may be due to a difference in judgment and a difference in specific circumstances surrounding the incident.

Mr. HOWARD. That was the witness' answer?

Mr. FEINBERG. Yes.

Mr. HOWARD. Some of this, it is going to be hard to determine if it is a question or an answer.

The COURT. Do it any way you want to, Mr. Feinberg.

Mr. FEINBERG. What I am going to try to do, where it is obvious—at least to me—that the question and answer is not necessary, I won't say it.

If it appears to be confusing, I will try to say it.

Q. Might it also be due to differences in the psychological makeup of the principal who is [16] making the decision?

A. Yes; hypothetically, that might be possible.

Q. Conceivably it could be the same principal who decides two children who violated the same rule would receive different punishment?

A. Yes; because of circumstances surrounding those, there could be a difference.

Q. What would those differences be based upon?

A. I can't say. They might be based on attitude, past history, specific time and circumstances in which it occurred.

Q. You referred to past history.

Is there a requirement, before corporal punishment is administered, the child's past history be investi-

gated, to determine whether or not corporal punishment should be administered?

A. There, again, it depends upon the circumstances. There are certain things in past history; for example, if a youngster is under medical or psychological treatment, for example.

Mr. FEINBERG. Page 21, Line 4:

Q. How would a principal be able to [17] determine whether a child was under medical or psychological treatment if he didn't read all the files or have a photostatic memory?

A. If he did not know, he would have to have access to someone who is acquainted with this child.

Q. You are suggesting it is or it is not School Board policy to make this determination in advance?

I have not gotten an answer from you on that.

A. The policy says corporal punishment shall not be administered to students who are under medical or psychological treatment without consulting with the physician, or something to that effect.

Q. Does the School Board policy say anything about—

Mr. HOWARD. Excuse me. I just wanted the record to show that, based upon what the transcript shows, Dr. Whigham was testifying without having the policies in his hands. He was being asked these questions from memory.

Mr. FEINBERG. That's correct. I concede that.

[18] Q. Does the School Board policy say anything about administering corporal punishment to a child for whom the parent has directed the school not to administer corporal punishment?

A. No.

Mr. FEINBERG. Page 22, Line 1:

Q. Is there any informal policy concerning this issue?

A. You mean from the School Board?

Q. No; in the school system.

A. No.

Q. So a principal would be able—despite the parents' prior objections, a School Board principal would be able to determine to corporally punish a child for a particular infraction, under present School Board policy?

A. Yes. The principal would not be required to have the permission of the parents.

Q. In your opinion, your personal opinion, would you consider it good educational practice?

A. You are asking me in terms of my personal judgment, and not the policies covering this?

Q. Yes.

A. I would think a principal would want [19] to consider a request of a parent, and he would then have to judge, himself, whether he is going to accede to that or not.

Q. But there are other alternatives to corporally punishing a child, other than corporal punishment?

A. Yes.

Q. What do those include?

A. These could be conferences with a student; it might be having the parent in, or suspending or expelling the student.

Here, again, there is a wide range of practices which the administrator might consider.

Q. Is there any requirement imposed on the principal to employ any of those alternative punitive measures, or remedial measures, prior to giving a decision to corporally punish a child?

A. The policy says a principal should consider other means and generally indicates corporal punishment should not be one of the first things tried.

It is a general statement and, here again, he would have to judge this with the specific circumstances with which he is faced.

[20] Q. Would you say a principal would be in violation of this policy if he did not employ any of the means of behavioral control, prior to deciding to administer corporal punishment?

Mr. FEINBERG. Page 24:

A. General, or one specific case?

Q. I mean in every case.

My question is, if, in any individual case, the principal, hypothetically, would utilize corporal punishment as a means of punishing a child before administering or utilizing any of the alternative methods of behavioral control, would that be in violation of School Board policy?

A. Not necessarily.

Mr. HOWARD. Your Honor, I think I should object to this. He was asking Dr. Whigham to try to interpret the policy, and the policy, of course, is in writing and can speak for itself. The Court. Overruled.

Q. It is conceivable that corporal punishment is an appropriate means of discipline in an instance, despite the fact that no other means of control or remediation has been employed?

A. I think my answer to the question [21] would be yes. I would want to qualify it a bit, but it is yes.

Q. You are entitled to qualify it.

A. I don't mean by that that the principal can walk up and just start paddling.

He would have to look at the specific circumstances he is faced with; but I don't think he would have to show he exhausted every other means.

He would have to judge this in a specific situation.

Mr. FEINBERG. Page 25:

Q. The question was whether he would have to employ any other means, which is a different question.

A. I think, from the time the principal is faced with a situation, he is considering alternatives in his mind. I don't think this rules out corporal punishment.

Q. In spite of the fact that he actually has not employed any other means of remediation?

A. Yes.

[22-45]

[46] Mr. FEINBERG. I will call Dr. Whigham. Thereupon:

EDWARD L. WHIGHAM was called as a witness by the Plaintiffs, and having been first duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

By Mr. FEINBERG:

Q. Dr. Whigham, in an effort to shorten your testimony, I will just review with you—we have already read in your credentials and who you are and where you were employed; save for the fact that now we are more than a year later after our last deposition. So you have been a school superintendent about five years now; is that correct?



A. That's right.

Q. Does the corporal punishment policy make a differentiation between the use of physical force or first restraint and then corporal punishment as a means of punishment?

A. No. It does—

Mr. HOWARD. Excuse me, Your Honor. [47] The policy is in evidence and it is going to say what it says, and I object to questions to Dr. Whigham asking him to try to interpret it.

Mr. FEINBERG. If Your Honor please, in response to that, the latest revision, the revision that Dr. Whigham was questioned about at the time of the deposition, made it very clear that there was a differentiation between physical restraint and corporal punishment, because they had it under two different headings. The latest revision seems to combine them.

I don't believe the policy has changed and I want to establish there is a difference.

The COURT. All right, sir. Overruled. You can answer it, Doctor.

The WITNESS. The policy attempts to make a differentiation between physical restraint, in certain circumstances, and corporal punishment as such.

By Mr. FEINBERG:

Q. So when we speak of corporal punishment, particularly under the latest provision, we speak of paddling; is that correct?

A. Yes.

Q. Under the regulations and the policies, [48] which I will treat as one, for the purpose of our questioning here, may a student be paddled if he is currently under the care of a psychiatrist?

Mr. HOWARD. Your Honor, this, again, is either in the policy and regulations or it is not.

Mr. FEINBERG. If Your Honor please, I think the interpretation of these policies is what this case is all about.

The COURT. Are you asking the witness to tell me what is written or are you asking about general policies in operation, or what is your question?

Mr. FEINBERG. I am trying to determine—and much of my deposition that I read in was an attempt to put flesh on the bone of these policies and to find out what is permissible, what is not permissible, so that the Court and every-

body else has an understanding of what the corporal punishment policy is all about.

If, indeed—frankly, I have nothing to hide here—if it turns out that many things that are occurring in the schools are allowable, by these policies, or not specifically denied to people who paddle in the school system, maybe these policies [49] ought to be changed and maybe they ought to put it expressly in the policies.

The COURT. You are asking the witness to interpret the written policy?

Mr. FEINBERG. That is exactly right.

The COURT. All right. Now, what is the question?

Mr. FEINBERG. Not only that, Your Honor, every one of these questions that I am asking is derived from evidence which I intend to put on the witness stand.

In other words, they are not figments of my imagination. I haven't made these up.

The COURT. It seems to me if the policy says one adult must be present, other than the person administering the paddling, that you don't have to ask him if that is in the policy or not, do you?

Mr. FEINBERG. If Your Honor please, if you will remember the testimony, I didn't ask if that was in the policy. I know the Court can read what is in the policy.

The question that I have is whether that is a flexible policy or how flexible is it, and I think that is very relevant.

[50] The COURT. So you are asking for interpretations?

Mr. FEINBERG. Exactly.

The COURT. All right. What is the question now before us?

Mr. FEINBERG. The question is, may a student be paddled if he is currently under the care of a psychiatrist.

Now, the policy speaks as to a psychologist and a medical doctor. My question is, may the student be paddled if he is under the care of a psychiatrist.

The COURT. The objection is overruled.

You may answer.

The WITNESS. If the youngster is under the care of a psychiatrist, then this form is available to the principal. Then I expect him to find out why he is—I would expect that he would seek to find out why the youngster is under the care of a psychiatrist.

I would say, in general, the usual sort of problems that would lead a student to be under the care of a psychiatrist might be the kind of problems that would not lead the principal to use [51] paddling. He may not be—he would have to know the specific reasons.

By Mr. FEINBERG:

Q. What is a cumulative record?

A. A cumulative record is a record kept by the school which contains information about the student's educational progress and career, with certain background information.

It is kept from year to year.

Q. So it is a cumulative history, educational history, of the student in his progress throughout the schools; is that correct?

A. Yes.

Q. Is it not also true that it follows the student to the particular school that he happens to be attending at that time?

A. Yes; it would.

Q. Would it be available to the principal or other people in the school to examine at any time? Is that correct?

A. It would be available for him to examine.

Q. Does your interpretation of this corporal punishment policy require, prior to determination [52] that corporal punishment will be administered, that the principal examine the cumulative record of the student?

A. We do not have a regulation that requires him specifically to examine the cumulative record.

A student would be brought to the principal for corporal punishment probably by the teacher or someone else. The teacher is supposed to be familiar with the cumulative record of the school.

Q. Are you suggesting that in every, or even most cases, of corporal punishment, the teacher actually brings the student down and discusses the prior educational history of the student with the principal?

A. I am suggesting that the principal does not initiate the action; that the action is initiated from a teacher or some other staff member.

Q. That happens in some cases and in some cases the principal might initiate it; is that correct?

A. It might.

Q. In some cases another administrator might initiate it, or a counsellor or anybody who is [53] in authority at the school?

A. Right. Students are mostly under the direction of teachers while they are in school.

Q. There is no formal requirement to examine the cumulative record.

My question to you, sir, is, even if we assume that a student's psychological, psychiatric, or medical condition is in the cumulative record, if there is no formal requirement that the cumulative record be examined, how is the principal to know whether or not he should consult with the particular physicians that are involved before deciding to paddle?

A. Let me go back. You are making a statement which is not the same one that I made. You said there is no formal requirement.

I said there is no formal requirement that the principal examine the cumulative record. If the teacher recommends this and the teacher's response is, "I am familiar with the youngster's record," then, of course, he may act on that.

If he does not have this information, then he should seek it.

Q. There is no formal requirement that [54] principals seek it in every case, though, is there?

A. Let me state this as I intended the statement: What I am saying is, there is no written regulation which says the principal can never authorize or administer corporal punishment without prior exhaustive examination of the cumulative record.

This is how I understood your question.

Q. My last question to you was, assume that the medical history, including possible psychological or psychiatric history, was in the cumulative record—is there any requirement that such history be in the cumulative record?

A. We have certain requirements of health information that would be in the record. Medical history or psychiatric history, not necessarily.

Q. So it is quite possible and quite conceivable that a child could be under this form of treatment unbeknown to anybody in the school system?



A. It is conceivable that he might be, yes.

Q. If, as you testified on deposition, corporal punishment may be administered in a rest room or a bathroom, under certain circumstances, and [55] in front of other students, what does the phrase in Paragraph 4 of the new revision of the regulations mean, "that corporal punishment is to be administered under conditions not calculated to hold the student up to ridicule and shame"?

Mr. HOWARD. Your Honor, I think that is a very drastic impression of his testimony before on his opinions about permissible places for corporal punishment.

The COURT. I interpret the question to be the following: "What meaning do you attach to the following sentence?" Is that what you are asking him?

Mr. FEINBERG. That is correct; but I have asked it in the form of a hypothetical, because I think that the testimony was quite clear—that is why those questions were asked—that a child can be paddled in a bathroom; he can be paddled in front of other people.

The question simply is, taking those into consideration, what does that provision mean; that he shouldn't be held up to ridicule or shame?

The COURT. You can answer the question, [56] sir.

The WITNESS. To not hold the student up to ridicule or shame means that we don't want—by this action of corporal punishment, we do not want that the student be ridiculed or be made ashamed before his peers and before others.

By Mr. FEINBERG:

Q. I'm sorry; I can't hear you, Dr. Whigham. Not made what?

A. If you want me to define "ridicule" or "shame"—

Q. I'm asking you, what understanding do you attach to that if children can be paddled in front of other children and children can be paddled in a bathroom? What meaning do you attach to not holding a child up to ridicule or shame?

Mr. HOWARD. Your Honor, that is an improper distortion of what he said. He said, in his deposition testimony that it would not necessarily be improper to paddle a child, under some circumstances, in a rest room, and so on, but he, himself, had reservations about it.

I think this question attempts to slant the whole thing the other way.

[57] The COURT. Overruled.

The WITNESS. In reference to your question about paddling in the bathroom, I have forgotten my exact wording in response to that, but—

By Mr. FEINBERG:

Q. Dr. Whigham, I am really interested—the Judge has rephrased my question. I am really interested, in your own words and not in the words of the policy, what does it mean—if you can give an example of what would be ridicule and shame, perhaps that will help.

What does that mean, that a child should not be held up to ridicule and shame?

A. But you have tied your questions to some other practices of punishment; in the bathroom and so forth.

Q. Those practices, to be ridicule and shame.

A. My response to your question, I believe, in the deposition was that I would not rule out, under certain circumstances. The meaning of that response was that I would not rule out or say a principal could never paddle a youngster or punish a youngster in a rest room.

[58] We have 237 schools in Dade County. At certain times, under certain conditions, the office or some other place might not be appropriate and a rest room might be the best available place for a principal or a teacher, whoever was authorized, to administer the corporal punishment.

I think, for example, if you want to take one that I would find very questionable, I could not, offhand, see why a principal would be doing it, is if he decided to administer the corporal punishment in the main entrance to the building, for example, an action which would be, it seems to me—unless he can offer a very acceptable reason of why he was doing it—would seem to me to make this a public occasion and this would come within the concept of subjecting this youngster to shame and ridicule.

Q. Does the corporal punishment policy, as you understand it and as you interpret it, authorize physical education teachers to decide whether to corporally punish, without prior consultation with the principal, on a regular basis?

A. No, it would not authorize that.

Would you think that the corporal [59] punishment policy encompasses paddling for reasons such as gum-chewing, standing with one foot on top of another, not dressing out

properly, not wearing tennis shoes or wearing dirty underwear?

Would you consider those appropriate grounds for corporally punishing a child?

A. I believe, if I recall the ones you listed, appropriate grounds for corporal punishment with the proper procedures and authorities.

Q. Even with the proper procedures?

A. This, again, would depend on the circumstances. You are asking me a series of hypothetical circumstances about practices, and I don't know what kind of situation this occurred in, how much of the defiance of the school people this may have constituted, and so forth.

In general, I would say no.

Q. Does the corporal punishment policy encompass paddling entire classes for the wrongs of a few?

I will give you a specific example: Let's say a child's money is stolen. Does the corporal punishment policy authorize, in your opinion, the paddling of the entire class because the person [60] who stole the money won't come forward?

A. No.

Q. Would you consider it appropriate to paddle students for the sole reason that they failed to learn their lessons up to the expectation of the teachers?

A. I think the answer to that is no.

Q. Perhaps part of the deposition covered this, but I would like to ask it more generally:

Would you consider paddling to be excessive or severe if it resulted in observable injury?

Mr. HOWARD. Your Honor, I—

Mr. FEINBERG. I think he can answer it. If he can't answer it, he can say he can't answer it.

Mr. HOWARD. It seems to me this entire line of questions about asking the superintendent of schools about what he personally thinks would be appropriate or inappropriate to paddle, in hypothetical questions, doesn't go to any relevant kind of proof in the Court that we are now trying in this Court.

Mr. FEINBERG. If Your Honor please, [61] in response to Mr. Howard's argument, every one of these corporal punish-

ment policies has some statement in words or effect, that paddling should not be extreme or severe.

Indeed, the previous policy, which has since been amended, specifically states that the person who is administering the paddling must be cognizant of the fact that he might be held personally responsible for injuries which result in his paddling, and my question, I think, goes to an interpretation of those provisions.

The COURT. All right, sir. Overruled. You can answer it, Doctor.

The WITNESS. Could I have the question back, please?

Mr. FEINBERG. Mr. Reporter, please—

The COURT. You know what you want to ask him; just ask him again, Mr. Feinberg.

By Mr. FEINBERG:

Q. Does the corporal punishment policy, as you interpret it, authorize paddling so as to cause observable injury?

A. No; but I would want to say here, of course, when it says punishment shall not be extreme, [62] severe, or whatever the specific words are that are used there, in an administrative policy and regulations, this would require interpretation.

Q. That is what I am asking you, sir.

A. As you describe the situation, my answer would be as I have indicated.

Q. "No"?

A. It would be no; but I am saying this is a matter of interpretation here.

Q. I am not sure I understand you.

Is there some phrase or word that you didn't understand? "Observable injury", I think, is clear.

A. I am saying it is a matter of the interpretation of the words.

Give me your question again.

Q. Would the corporal punishment policy be violated if a paddling resulted in observable injury?

A. What do you mean by "observable injury"?

Q. Injury that can be seen.

A. There might be some—in other words, it is possible that, in certain circumstances, such [63] as a sensitive youngster's skin or something, that it might produce a situation that the principal might not know would be produced there.



You are saying "observable injury", and I am saying, in general, the answer to your question would be no under those circumstances.

Q. You are qualifying your answer? You are saying if the principal didn't know about a special condition, perhaps, that the student had, and it resulted in observable injury, then that—am I not right—that you are saying that might not be a violation of the corporal punishment policy?

A. No. What I am saying is that when you administer corporal punishment you may get a reaction not anticipated, to the skin of the body.

The COURT. The difficulty with the question is the word "injury". Sometimes when you paddle a kid, his buttock looks red when he gets home and the next day it is okay.

Is that an observable injury?

Mr. FEINBERG. All right; I accept that, Your Honor.

The COURT. Is something a little bit black and blue an injury, as an example, if it goes [64] away in one day? This is the difficulty in answering your question.

By Mr. FEINBERG:

Q. Would you think that the corporal punishment policy, as you would interpret it, authorizes or allows for giving extra licks, let's say, to the student, if he cries out when he is hit or moves the chair that he is leaning on?

Would you say that is encompassed within the policy? Would you say that would be questionable practice?

A. I think that would be questionable practice as I understand you to describe it.

Of course, the present policy which the School Board has in effect, gives the maximum number of licks, to use your phrase.

Q. You already answered this indirectly, I think, the next question I have.

Would you consider the paddling of tardy students to school, outside of the main entrance of the building, prior to allowing them to enter the school, to be a violation of the ridicule and shame provision of the paddling policy?

A. Paddling a student for being tardy, [65] in the full view of others, I would say is not consistent with the policy.

Q. Is it not true that the corporal punishment policy provides that a determination must be made whether or not paddling will change the behavior of the student? Isn't that a part of the policy?

If you want, I can read it to you.

A. Yes; why don't you read it to me.

Q. I am now reading from the latest revision, and I would state to the Court that this provision has been virtually unchanged:

Corporal punishment is generally applied to the body of the offender or is physical punishment as opposed to other forms of punishment, and is administered as a means of changing the behavior of students.

It is, therefore, important to analyze whether or not this goal will be accomplished by such action.

Do you remember that in the policy?

A. Yes.

Q. My question to you, sir, is, taking that particular requirement into consideration, would [66] you consider it a questionable practice to paddle a student three or four times within a two-week period?

A. In general, yes, I think it would.

It is not inconceivable to me that it might be done, but in general I would think that would be a questionable practice.

In some cases, it may be that administrative judgment is that this sort of repeated corporal punishment might have some hope of changing the behavior of that student.

On the other hand, the question can also be raised as to whether the repetition of the corporal punishment was, in fact, accomplishing anything in that case.

Q. Do you subscribe to the theory that paddling should continue in the schools because—and now I am quoting, sir, from the May 22, 1969 report, entitled, "Reaction of Junior High School Principals and Faculties to Prohibit Corporal Punishment at These Levels".

Would you subscribe to this statement which is a quote—

Mr. HOWARD. Excuse me. Are you going [67] to introduce that?

Mr. FEINBERG. No; I am going to question him about it.

By Mr. FEINBERG:

Q. "At times unadulterated fear must be induced to provide some behavior controls. This, of course, is not the theoretical ideal, but at times it is absolutely essential, if any reasonable school climate for learning is to be maintained."

Do you think that is a good reason; "unadulterated fear"?

A. I would not use the phrase and would not agree with the term "unadulterated fear".

Q. Yet, in this compilation, which I will show you, it was cited in support of continuing the policy.

A. I would have to study their report. It has been some time since I have seen it, and I think this might be the quotation of a particular individual's statement, not representative of the general administrative view, or certainly not an official viewpoint.

Mr. HOWARD. I am not sure he was able to finish his answer.

[68] Mr. FEINBERG. I'm sorry.

Mr. HOWARD. You didn't let him answer as to the complete statement.

The COURT. Finish your answer.

Mr. FEINBERG. Your Honor, I'm sorry; I didn't hear you.

The COURT. I said, let the witness finish his answer.

The WITNESS. I would not use the term "unadulterated fear" that is used in that particular person's statement, whoever it may be. It is unidentified there.

I think corporal punishment is viewed by many school personnel, administrative people, and instructional people, as a technique that may be used for control of—social control, in a school situation. But to use the phraseology or terminology, "unadulterated fear", I would not agree with.

By Mr. FEINBERG:

Q. You have familiarity with this report; is that correct?

A. It is a report of some several years ago, and I don't readily recall the details and the circumstances of it.

[69] Q. But you remember the report was prepared; is that correct?

A. Yes; and I can't even recall why and under what circumstances it was prepared.

Q. Do you recall whether or not any attempt was made to find out who made that statement and to question the principal who made that statement?

A. I don't recall, at the time, whether any attempt was made to find that particular person and question him about his terminology that he used there.

Q. If I had a principal on the witness stand now who made that statement, would you be kind enough to question

him about the use of corporal punishment in his school, if he came out and said, "I use corporal punishment to create unadulterated fear in my school, and it is necessary, to maintain discipline in my school"?

A. If I had knowledge that the principal was making that, I would want to know something about the circumstances and so forth, that I would want someone to raise a question with him about what he means by that.

[70] Q. Getting back to the interpretation of the policy and the regulations, as you interpret the policy, is there any requirement that a person who is dispassionate and unfamiliar, personally unfamiliar, with the events to the paddling, make the decision to paddle?

Is there any such requirement?

A. My answer to that would be yes. It is not in the terminology of the words you are saying; you say "dispassionate", and I have forgotten the other words you used.

Q. What I am really getting at—and I will ask it in a different way—isn't it true that this policy authorizes a principal who has, himself, observed the alleged wrongdoing, to administer the paddling and decide it should be administered?

A. It could, under some circumstances, yes.

Q. You say, "under some circumstances"?

A. The ones you have just specified in your question; he is the one that observed the misbehavior and, therefore, he decided to act.

Q. There is no restriction on a principal deciding and administering the paddling when the [71] principal has, himself, decided that he has seen the person or the child doing something wrong? There is no requirement he consult with somebody else, is there?

A. No, there is not a requirement that he consult with someone else.

Q. You mentioned before that the number of licks allowed has been limited according to whether you are elementary school, junior high school or high school?

A. In the current policy; that is correct.

Q. What provision is there, or what way is there, either in the policy or that you know of, to insure that those limits are adhered to?



A. It is a provision of the policy that the principal is to keep a log on the cases of corporal punishment.

Q. How do you have any insurance that the log is going to be maintained accurately? Is there any way of assuring that?

A. Yes; by the administrative staff under whom that school works, which would look at that log.

[72] Q. If the principal didn't write down a paddling that took place, there would be no way of knowing such paddling took place?

A. That's right; if he wanted to falsify the records, then he could do so.

Q. Indeed, there is no real way of knowing that any of these requirements are adhered to; any of these regulations, the ten or so?

A. I would have to say my answer to that would be no.

Q. Isn't it true that there is no formal requirement and it is not the practice to inform the student population of these regulations?

A. No. I think the answer to that is no.

Q. What requirement is there?

A. The requirement to interpret to the staff and students what the rules and regulations of the school are.

Q. Where is this written?

A. It is written in—I think implied or written, in a number of places in our policies.

Q. Are you suggesting it is the policy of the school system to inform the students, "When you are paddled, you will receive only so many licks; [73] and a determination must be made by a principal; you are not allowed to be paddled by anybody other than the principal"?

A. I think the principal would need to interpret those policies and regulations to his staff and to his student body.

Q. I'm not asking you about the staff, sir; I'm asking if you have personal knowledge of the fact that students are informed of these policies.

A. I could not have personal knowledge of what goes on in 237 schools.

Q. You can't point out any regulation which said that these particular policies—corporal punishment policies and

regulations be posted in the school any place, or be distributed to the students?

A. No; we do not have regulations requiring them to be posted.

Q. Isn't it a fact—and I would be happy to show you the policy and regulations for the purpose of this question—that the only objective or subjective, or combined objective and subjective, determination to be made by the principal before he decides to paddle a student, is whether or not it will change his behavior?

[74] A. Repeat that question again.

Q. Isn't it a fact that the only requirement contained in these policies relating to the determination of whether a paddling should take place, is the determination by the principal of whether or not the paddling will change the student's behavior, and that is considered an important requirement?

The word "important" is written in.

A. I think the answer to what you are saying is yes, as I understand your question.

Q. Notwithstanding your statement, which I read into the record, that it is possible that paddling might cause severe psychological harm, which is your testimony; do you still consider the principal is qualified to make that determination?

A. Yes, I would think so.

Q. Do you consider the principal is fallible?

A. I consider all human beings are fallible.

Mr. FEINBERG. No further questions.

#### CROSS-EXAMINATION

By Mr. HOWARD:

Q. Dr. Whigham, in the portions of the [75] deposition that were read, and the questions that were asked by Mr. Feinberg, there was very slight reference to your background and educational employment, and I would like to amplify that a little bit.

You have been superintendent of schools for five years now in Dade County?

A. I will have to count them up myself. I came in 1968. Going on five years, Mr. Howard. Soon, before too long, it will be the end of the fifth year.

Q. Could you briefly tell the Court your educational background?

A. You mean collegiate preparation?

Q. Yes; your collegiate and graduate work and degrees which you hold.

Mr. FEINBERG. For the record, I would like to object to this examination, because I think it goes into, perhaps, the question of qualifying Dr. Whigham for testimony that Mr. Howard would want to submit in defense of this suit.

The COURT. No. You have asked him for many opinions and this goes to the Court weighing it, deciding what weight should be given to the opinions. It is proper questioning.

[76] The WITNESS. My Bachelor's Degree from Emory University of Georgia; Bachelor's Degree from the University of Georgia; Doctorate from New York University, Doctorate and Ph. D. Bachelor and undergraduate degree in political science.

By Mr. HOWARD:

Q. Would you briefly detail your employment experience, then, as an educator?

A. I was initially, in education, a teacher. Then, following that, assistant principal, a principal; then I was an assistant superintendent of schools for a number of years and then was superintendent of schools in Oak Ridge, Tennessee prior to coming to Miami, where I came as a deputy superintendent of schools and then became superintendent.

Q. Was corporal punishment, or the authorization for the use of corporal punishment, a generally prevalent technique of pupil control in the various school systems in which you have been employed as a teacher or as an administrator?

A. I am hesitating on your words, "generally prevalent".

Q. I am not asking you about the prevalence of its actual use.

[77] A. You are not asking about its use?

Q. Was it authorized in the various schools?

A. By policies, yes. In the school systems, I believe, in which I have worked, it was permissible, by policy, to administer corporal punishment.

Q. You gave the figure of 237 schools in the Dade County Public School System?

A. Yes.

Q. What is the student population now in the Dade County Public School System?

A. The student population, at this time, is somewhere between 240,000 and 243,000 students. That is elementary and secondary schools. It does not include adult programs and so forth.

Q. What is the total personnel population in the school system, of both teachers and administrators?

A. You mean teachers and administrators?

Q. Yes.

A. Because there are other employees.

Q. Leaving aside non-instructional, maintenance, carpenters, and such.

[73] A. The figure is somewhere around 12,000.

Q. What is the size of the Dade County School System as compared to other systems throughout the country?

A. Size, in terms of student enrollment—which I assume you are referring to—would make us the sixth largest school system in the United States.

Q. Would you explain to the Court, in general terms, your duties and responsibilities as superintendent of the school system? What different problem areas do you oversee in the superintendent's job?

A. I hope some of them aren't always problems.

The superintendent of schools in the Dade County system has a number of duties that are assigned to him by law, statutory.

Mr. FEINBERG. Your Honor, for the sake of brevity, I would stipulate that Dr. Whigham is the chief administrator, officer, of schools, and I think the Court can take judicial notice of the fact that he exercises executive duties in accordance with his powers in his job.

To go into every detail of what [79] his position is, I think is a waste of the Court's time.

Mr. HOWARD. I am not going to go into tremendous detail, Your Honor, but I think the scope of his responsibility goes, not only to his qualifications, but it also serves to put this issue of corporal punishment somewhat in perspective, from the standpoint of the operation of a school system of this size.

The COURT. All right, sir. Overruled.

By Mr. HOWARD:

Q. You may continue.

A. In general terms, a superintendent would be responsible for assisting the Board in the formulation and issuing of basic



policies and regulations for the operation of the school system, in making basic resource allocations for general oversight of the administration of the school system.

There are areas of operation which are administered from the county level; personnel service in the school system; the physical plant systems in the school system; the financial services, the transportation system, food service, and so forth, in our [80] school system is divided into six geographical areas and we have an area superintendent under whom the various school units operate, and the responsibility of the superintendent is the overall supervision and coordination of those services.

Q. Then your duties go considerably beyond just the overseeing of curriculum formation and the presentation of curriculum studies in the school, I gather?

A. Yes. The development of educational programs, instructional policies and regulations, basic program structures, of course, is one of the functions.

We have a department under—at the county level and, of course, that is also a responsibility area at the school level, but it includes the other functions, financial—the total operation of the school system.

Q. What is the current annual budget of the school system, Dr. Whigham?

A. If you include the current expenditure for capital purposes our annual budget would be \$275,000.

[81] Actually, the budget, by the time the fiscal year is over, we will get close to \$300,000. It is because you amend in certain portions of the budget. So \$275,000 to \$300,000 would be the budget.

The budget increases during the year, during various contracts, and appropriations are amended into the budget.

Q. From the standpoint of the pupil in the school system, your responsibilities at the top of the administrative heap include curriculum—general overseeing of curriculum?

A. Yes; in the educational programs, curriculum, if you like to use that term.

Q. The provision of the physical plant, the school's equipment?

A. Yes.

Q. The provision of personnel, teaching personnel, and administrators in the schools?

A. Yes.

Q. Purchasing?

A. Purchasing, yes, is one of the functions that is under our general administration.

Q. Transportation?

[82] A. Yes; transportation.

Q. Bussing is the word we use so much these days.

A. I don't think of those two terms as being synonymous, but yes.

Q. The provision of health and food requirements; lunches, clinical care?

A. Food service, yes.

The health services we provide, Mr. Howard, are health services provided through the County Health Department in the schools. It is a cooperative arrangement.

Q. In this total picture, I want you to discuss now the question of pupil discipline and purposes and needs for discipline among the pupil population of the schools.

Why is it necessary, in the first place? What purpose does discipline in the school serve?

Mr. FEINBERG. If Your Honor please, I really think this is way outside of direct testimony in this case. I limited my testimony to paddling and corporal punishment.

The COURT. What difference does it make, as a practical matter? You have one judge, no [83] jury, and it may well be that he is exceeding the direct and it might be that the witness may not have to stay here all week, or come back. I don't know.

Mr. HOWARD. That is one purpose I am trying to serve, to not have to do this in two or three pieces.

The COURT. You can ask the question. Maybe the biggest objection would be that if you are exceeding cross, then you should not lead or cross examine, but rather ask direct questions.

Mr. FEINBERG. I really have no objection to these questions in the abstract.

The COURT. Treat him as your witness when you go beyond cross.

Mr. HOWARD. All right, sir.

By Mr. HOWARD:

Q. Do you remember the question, Doctor?

A. Yes; discipline in the school: For the purpose of establishing what we call a climate—we use that term—that is conducive to learning and for the control of the behavior of students and students in groups at the schools, so that the purposes of the school can proceed.

Is part of this the example or teaching [84] to students about the existence of external standards or rules? Is that part of the discipline picture?

Mr. FEINBERG. Your Honor, I am going to object. That is a leading question and I don't think it is appropriate. If there was ever a leading question, that is it.

The COURT. Sustained.

By Mr. HOWARD:

Q. Dr. Whigham, assuming the need for an orderly climate for learning and order in the schools, which I think you mentioned, what different methods are available within the school system now for maintaining order and discipline and good behavior in the schools?

A. Let me get at some basic things which I think are very relevant here and are a part of it. As a matter of fact, I think some of our publications indicate it, or certainly our statements do, that the first, most basic thing, in terms of creating order in the school and behavior of students, is an adequate instructional program; placing a student in one of those programs which is suited to his needs.

The quality of teaching in the classroom [85] and the quality of instruction is a very important aspect of controlled student behavior.

In terms of the kind of practices or provisions that schools have made in controlling the behavior of students—we are talking in the broad dimension here—we have tried to emphasize the providing of students with a right to participate in the life of a school.

Q. How is that done?

A. In any number of ways; in student government, through participation of student activities. Secondary schools have been asked, for example, to set up specific committees that get at some of the current problems and concerns in the schools, and to have students' participation on those.

There are other kinds of ways of working with students, groups of students or individual students, where there is a

problem, such as conferences with them, conferences with their parents, having the assistance of some of the specialists where we have them on the staff, visiting teachers, psychologists, or referral to another agency, again, where that is available.

It is a matter of having conferences [86] with the principal or assistant principal.

The assistance of the guidance people is a part of this, although we don't see them as being responsible, per se, for discipline; the whole of the guidance, all of these are part of controlling the behavior of students at school.

There is also a School Board policy which permits the suspension and expulsion of students, if that is determined advisable.

Q. Do the PTA's and parent groups enter into this picture, also, in terms of methods of controlling student behavior?

Mr. FEINBERG. Excuse me; I didn't get your question.

The COURT. Does the PTA busy itself helping control discipline in the schools?

The WITNESS. Well—

Mr. FEINBERG. If that is the question, I have no objection.

The WITNESS. I think that works formally and informally. Some of our policies prescribe that parents shall be involved.

For instance, the school dress; parents shall be involved in the deliberation of [87] this.

Some of our other practices require that there be parental involvement. In addition to such formal means as that, I am sure it feeds back to the school officials, the teachers and principal and so forth, informally from parents, who are certainly a part of this.

By Mr. HOWARD:

Q. Are curriculum adjustments made, from time to time, with particular students, to attempt to help with behavior problems? Is this a standard technique?

A. Yes. This is to be looked at as whether this youngster is properly placed in the instruction program from the standpoint of both the particular instruction experience being offered him in the class or curriculum to which he is assigned, plus the possibility of shifting this youngster to a program which more nearly meets his interests and needs and to the extent that we have resources to do it, yes.

The answer to your question is yes.



Q. I think you mentioned, in your direct testimony, that one of your responsibilities is to formulate and propose policies and regulations to [88] the School Board for adoption?

A. Yes; or to be the person who heads up this process.

Q. You oversee the process of the formulation of the policies?

A. Yes.

Q. Are there various policies enforced, bearing on student behavior and discipline within the schools?

A. There are, and from time to time we have issued publications that summarize—not summarize, but list those, and indicate the reference to them, or as far as the administrative staff, each member of the administrative staff, each principal, each head of a department or office of each school have a copy of Board policies and regulations; but we have issued publications.

Q. Can you enumerate some of the policies, and if you have material that you want to refer to to help you, you can do so; the policies which have to do with student behavior and student discipline?

A. Policies relating to control of student behavior on buses; policies in reference to field trips; policies in reference to dress; policies in [89] reference to the relationship between law enforcement officials and the school and the student while he is at school.

Policies requiring that certain kinds of committees be set up in schools and certain steps be taken toward the control of conduct at school.

Policies on suspension and expulsion. Policies on corporal punishment.

Policies of this type.

Q. The policy, then, and regulation, on corporal punishment is one of these various techniques or written policies which are available to the school staffs?

A. Yes.

Q. With reference to the policy and regulations on corporal punishment, is this reviewed and revised, from time to time? Has it been so developed?

A. There is no requirement—I think my answer to your question is yes, but I would like to respond to it.

There is no requirement that they be, at a specified interval, reviewed. Because of the concern of school behavior and conduct of students, in recent years it has been revised numerous times.

[90] Q. Is this true of other policies and regulations relating to student behavior and control?

A. It would be true of all policies and regulations.

Q. Dr. Whigham, you were asked a number of questions about your opinions on corporal punishment, and I want to ask you just a few more.

How do you see the role of corporal punishment in the school system today? What is its place? What is its proper function, as you see it, for the availability of corporal punishment as a technique?

A. Well, I think there are strong differences of opinion, even among professional educators, about the use of corporal punishment.

It is a technique which is available to staff members, under the Florida law and under the School Board policies and regulations.

Staff members feel it is a useful technique under certain circumstances.

I am not sure I am being responsive to what your question is.

Q. Do you, or does anyone else, as far as you know, within the educational circle, recommend it [91] as the prime and only technique for controlling student behavior?

Mr. FEINBERG. Your Honor, I object to the very generalized nature of that question. He says, "does anybody", and that is pretty general.

The COURT. You can answer that question. Overruled.

The WITNESS. Well, I was going to say, Mr. Howard, I can't say what everybody—which is what your question implies—in education may think about this.

It is not my general impression that educators generally would find the use of corporal punishment as you indicated. As a matter of fact, quite the opposite; that they would not find acceptable the indiscriminate use of corporal punishment.

I would use the term, "indiscriminate" to describe—to be the same as the adjectives that you just used to describe it.

By Mr. HOWARD:

Q. What are the relative advantages and disadvantages, or the considerations, to be taken into account by school administrators, as between the [92] administration of corporal punishment and suspension or expulsion of a student? What factors are involved in that decision?

A. I think the administrator, in deciding whether he was going to use one or the other—here, again, we have a hypothetical question, and I always want to give the responses—it depends on the specific circumstances; but I think, in the first place, he would need to determine first the other means are not useful or have not succeeded, the other means available to him to have control or to secure proper behavior, desirable behavior, as he would find it in that situation, from the student.

With reference to the two that you specified there, suspension or expulsion versus corporal punishment; suspension or expulsion would terminate either temporarily or for a longer period of time, the education of the youngster, and he needs to weigh that step, which is a very serious step, against whether the corporal punishment would, in fact, bring some improvement in the situation; whether it is a useful procedure or technique with this particular youngster and that particular situation.

If he concludes that it is not and [93] the other means are available, then he might want to turn to suspension and expulsion.

Am I responding to your question here?

Q. Corporal punishment leaves the student in school, right, as opposed to suspension or expulsion?

A. That is the idea behind it, yes.

Q. Assuming that corporal punishment is to be used in a given instance, is it desirable that the punishment be given as quickly as possible after the offense?

A. Yes; as a general principle we have found that is desirable.

Q. What are the reasons against a delayed period of any significance between the misconduct and the administration of corporal punishment?

A. Primarily to keep—

Mr. FEINBERG. If Your Honor please, I am going to object to this question. I think it calls for an answer from an expert psychologist, and I don't think the doctor is qualified as such to answer this question, particularly since the policy talks about anxiety, which is a psychological term.

The COURT. We don't expect him to [94] testify in the area of psychology, but I think he can answer the question. Overruled.

The WITNESS. To keep the youngster from building up undue concern in his mind about the impending punishment; to keep from coping with this over a long period of time; the idea is to go ahead with the punishment, as in the terms indicated in the policy.

By Mr. HOWARD:

Q. In your opinion, would it be desirable or functional to post a detailed list of infractions for which corporal punishment could be administered, with a list of how many licks for each?

As an educator, how does that idea sound?

A. You are asking me for my judgment, and my answer to that would be no.

Q. Why not?

A. The problems of posting a detailed list in that—trying to get a list that is exclusive, that becomes exclusive in terms of human behavior and behavior of students at school, I would not favor the particular list and posting a list.

I think it tends to remove—certainly [95] is a factor in removing any judgmental aspects. I think the judgment does need to react to the situation.

Q. Would it be desirable or functional to require a formal or stylized hearing procedure in every instance, before the administration of corporal punishment?

A. We have not felt it was desirable to require that; assuming you are referring to some sort of administrative hearing.

Q. Some sort of procedural steps similar to what we now provide for suspension hearings, for example.

A. I think this would require more time; would require more personnel to be involved and so forth, that it would lengthen the time, for instance, if it was determined that punishment was to be administered, it would lengthen the time before the punishment was administered.



Q. You are referring back to the student's concern, then, or worry, which you mentioned before?

A. I would consider that would not be desirable to prolong that period of time.

Q. Following that, then, obviously the [96] way the policy and regulations now require the principal to make the decision for administration of corporal punishment involves some delay, as opposed to the teacher administering the punishment.

Summarily, in view of your last answer, what is the desirability of having the principal pass on making these decisions in each case?

A. The law provides, if I recall, I assume the thinking behind that provision was not to give—

Mr. FEINBERG. Your Honor, I object to assuming the thinking.

The COURT. Sustained.

By Mr. HOWARD:

Q. What is your opinion, your judgment, on the desirability of having the principal be the one who decides on corporal punishment?

A. There is one person in the school that is passing judgment on the total practices of the school, and also so that that decision is not made solely by a teacher in the school; but the teacher, in order to have corporal punishment administered, would have to consult with the principal, would have to have the judgment of the principal himself involved.

[97] Q. Mr. Feinberg asked you some questions intended to suggest that there was no way that the policy and regulations on corporal punishment can be enforced, so to speak, within the schools.

Is it not a fact that the policy requires the presence of an adult witness when corporal punishment is to be administered?

A. The policy specifies that, yes.

Q. It does require that a log be kept of each corporal punishment?

A. The present policy does specify that, yes.

Q. If the principal, or any other member of the staff, violates these policies, would there be grounds for dismissal or for proceedings for dismissal?

Mr. FEINBERG. I object to the leading nature of that question.

I withdraw the objection.

The WITNESS. If any violation of the policy would require that, we consider that and take some action with reference to it. It might or might not lead to the particular action that you mentioned.

Mr. HOWARD. I have no further [98] questions.

#### REDIRECT EXAMINATION

By Mr. FEINBERG:

Q. When you testified to a number of alternative methods of dealing with disciplinary problems in school—you just testified to that?

A. Yes.

Q. Corporal punishment is merely one in the arsenal that is available to the school system dealing with disciplinary problems; is that right?

A. Yes.

Q. Isn't it true that the corporal punishment policy is generally considered a last-resort disciplinary measure?

Isn't that the terminology used in several of the editions of the corporal punishment policy?

A. That terminology is used. This term, as I would understand it, does not mean that every other means must, in every circumstance and with each individual case, be exhaustively used. It means that it is not to be considered the sole means of discipline in the school.

Q. Wait a second. You are saying, on [99] the one hand it doesn't mean that all other punishment be used. On the other hand, it doesn't mean it is the sole means.

Doesn't it mean that it shouldn't be considered the first? Isn't that the general meaning of it?

A. No, I would not say that. I would say no, in every circumstance it does not mean it cannot be.

Q. I didn't ask you in every circumstance. I said generally it suggests at least it shouldn't be the first. Isn't that a fair statement?

A. It depends on what you mean here. If you say it generally means where it cannot be, then the answer to your question is yes.

Q. Do you attach any significance to the fact that that particular phraseology—and I will quote it from the 8/5/70 revision, the second paragraph—"Corporal punishment may be used in the case where other means of seeking cooperation from the student has failed."

We find that particular phraseology in both the third and fourth revision. Quoting, now from the fourth revision, "Corporal punishment may [100] be used when other means of seeking cooperation from the student has failed."

We find that in the last revision that language, even in substance, has been deleted.

Is there any significance to the fact it has been deleted?

A. Yes; I think there is significance to the fact that it has been deleted. It was deleted because of the request of organizations, of staff members, particularly the classroom teachers association and others, who questioned whether the other terminology might not lead to an interpretation of what was not meant; precisely the point you are getting at today.

If I recall those discussions and debates at the time that that change was made, they particularly wanted to eliminate the "last-resort" phrase in the policy.

Q. Are you familiar with the National Educational Association?

A. Yes.

Q. Can you describe for us what the National Educational Association is?

A. The National Educational Association [101] is an organization of educators in this country now confined largely to the classroom teachers.

Q. Isn't it true that recently the National Educational Association came out with a long, detailed history called "Educational Psychological Report", condemning the use of corporal punishment in the schools and urging that it be phased out as quickly as possible?

A. I would not be able to respond to your question. I am not familiar with your report.

Q. Are you familiar with the report about which I speak?

A. No. I said I am not familiar with that report.

Q. Hopefully for the last time; getting to the question of who makes the determination as to who gets paddled, isn't it a fact that not only is it required by the School Board policy

that the principal be the one to make the decision, but the only mention of corporal punishment in state law—at least the only one that I can find—refers specifically to the fact that teachers should not paddle students without the prior consent of the principal?

Are you familiar with that? There [102] is a state statute spelling that out?

A. I can't quote it. I don't recall it.

Q. You suggested that violations—you stated, in fact, that violations—on cross-examination—that violations of School Board policy would result in administrative inquiry.

I think Mr. Howard asked you whether it would result in dismissal and you said it would at least result in some kind of inquiry; is that right?

A. It does not automatically lead to dismissal, but it would lead to an administrative inquiry.

Q. If violations of School Board policy are found to have been perpetrated by an administrator, then I assume some action may be taken; not necessarily dismissal, but some action?

A. Actions which are available to us by law or policy, yes.

Q. Do you know whether or not any action whatsoever was taken against those persons who paddled James Ingraham on October 6, 1970?

A. Yes. If I recall, and I don't recall the specifics—exact details may not be right there—[103]there was an inquiry or objection to that incident by the area office, I believe on two occasions.

Q. Do you know what the findings were of that area office?

A. No, I cannot give them to you; but I believe there was a reprimand, a letter of reprimand, placed in the file of the principal.

Q. Did Mr. Wells make the inquiry; do you know?

A. I can't say.

Q. Do you know if any administrative action was taken, as a result of the several paddlings which occurred in the month of September, late September and October 1970 to Roosevelt Andrews, the other plaintiff in this case?

A. I can't answer that precisely. I believe—I have forgotten whether the investigation—I don't know, Mr. Feinberg, whether it pertained to several cases or one case.



Q. You don't hold any kind of degree in psychology, do you?

A. No; I'm not a psychologist.

Q. You would agree—at least you did in your deposition—that there are certain circumstances, [104] certain psychological factors, that go into paddling students, aren't there?

If you want me to remind you of your testimony—

A. I want to explain psychological factors is a term used in one sense. Are you talking about an exact determination by a psychologist? That is another matter. But psychological factors, yes.

Mr. FEINBERG. That's all. No further questions.

[105-107]

[108] AFTERNOON SESSION

[Thereupon, the trial was resumed and the following proceedings were had.]

The COURT. Who is next?

Mr. FEINBERG. I would like to call James Ingraham.

Thereupon:

JAMES INGRAHAM was called as a witness in his own behalf, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. FEINBERG:

Q. Please state your name.

A. James W. Ingraham.

Q. Where do you live?

A. 9221 Northwest 16th Avenue.

Q. How old are you?

A. Sixteen.

Q. Who do you live at that address with?

A. My parents; mother and father.

Q. Who else?

A. My brother and sister.

Q. How many brothers and sisters do you [109] have who live at that address?

A. Eight people.

Q. Including yourself?

A. Yes.

Q. Where did you first start going to elementary school?

A. Gladeview.

Q. Is that in Dade County?

A. Yes.

Q. Did you go to any other elementary schools in Dade County?

A. No; not that I can remember.

Q. What school did you go to after Gladeview?

A. I was in junior high; Madison Junior High.

Q. Let's talk about Gladeview for a minute: Did you ever receive a paddling at Gladeview Elementary School?

A. Yeah.

Q. Do you remember what grade that was in, about?

A. Which one are you talking about?

Q. Excuse me—

[110] A. Board or a paddle?

Q. I didn't understand. I am asking you if you were ever paddled at Gladeview Elementary School.

A. Yes.

Q. More than once?

A. Yes.

Q. Do you remember in what class you were paddled?

A. Yes.

Q. What grade?

A. I was in the fourth, going on the fifth.

Q. Do you remember who your teacher was?

A. Mr. Curry.

Q. Do you remember the reason why Mr. Curry paddled you?

A. To going to tell the time. If you don't tell the time—if you don't get the chance, then they will paddle you.

Q. What location in the school did he paddle you?

A. In the classroom.

Q. Were the other students present in the classroom when you were paddled?

[111] A. Yes.

Q. Were you the only one that he paddled because you couldn't tell the time?

A. No.

Q. How many others did he paddle for reasons such as that?

A. Lots of people.

Q. Lots of other children in the classroom?

A. Yes.

Q. You specifically remember that?

A. Yes.

Q. Do you remember if Mr. Curry paddled students for any other reason other than not being able to learn?

A. Yes; they get their name written down on the board for talking.

Q. He paddled for talking?

A. Yes.

Q. Did you ever get paddled by Mr. Curry for talking?

A. Yeah.

Q. Did he ever take you to the principal's office?

[112] A. No.

Q. Where did he have the paddle?

A. In his room.

Q. Do you remember where it was? Can you picture the room and where the paddle was?

A. By the desk, on the blackboard.

Q. Where would he paddle the children in the room? Any specific place in the room?

A. Up by his desk. Sit down and turn this way and they face that way.

Q. Did he call the children up to the front of the room? Is that what you are saying?

A. Yeah, or else stand up.

Q. Did the paddle hurt; do you remember that?

A. Yeah.

Q. Did you cry?

A. No.

Q. Excuse me?

A. I held it in.

Q. Do you remember if any of the other children cried, in Gladeview?

A. Yeah.

Q. Do you remember any other paddling in [113] Gladeview Elementary School that you received or that you saw?

A. Yeah.

Q. What?

A. My PE teacher.

Q. By the PE teacher in Gladeview?

A. Yeah.

Q. Are you certain it was in Gladeview?

A. Yeah.

Q. Tell me about that. Why did the PE teacher paddle you?

A. I got paddled—it was my job to bring in the balls and I forgot to bring them in, so I got paddled for that.

Like if you fight out there, you get paddled, or don't get in line and playing around in line, you get paddled.

Q. Were you paddled for all those reasons?

A. I just got paddled for leaving out the balls.

Q. For not doing your job?

A. Yeah.

Q. Did you see other people paddled for those other reasons?

[114] A. Yeah.

Q. Do you remember his name?

A. Mr. Lawrence and Mr. Stewart.

Q. Two PE teachers.

Do you remember what grade that was in?

A. Sixth, fifth and fourth.

Q. Where did they get the paddles from?

A. I don't know.

Q. Can you picture where they obtained the paddles when they paddled you?

A. You mean out there? They have them on their desk.

Q. The PE teachers had their paddles on the desk?

A. Yes.

Q. Do you recall whether or not Mr. Lawrence and Mr. Stewart ever consulted with the principal before paddling anybody?

A. No.

Q. Did he ever take you to the principal before he paddled you?

A. No.

Q. Did you ever see them remove any of the other students from the PE room or the PE field [115] and take them away to the principal?



A. Some of 'them, sometimes. Like if they keep fighting all the time.

Q. You specifically remember, when you were paddled, he didn't go to the principal's office?

A. No. No, sir.

Q. This was both Mr. Lawrence and Mr. Stewart?

A. Mr. Lawrence and Mr. Stewart.

Q. Do you remember any other paddlings you received in the fourth, fifth or sixth grade, or that you observed?

A. I see Mr. Curry beat a teacher—I mean, beat students.

Q. Who?

A. Mr. Curry.

Q. You already told us about Mr. Curry. You mean in addition to what you have told us?

A. Uh-huh.

Q. Tell me about that.

A. Like you passing by the room you see him beating students.

Q. In other words, you would pass his room and look in; is that what you are saying?

[116] A. Yeah.

Q. Do you have any other recollection of paddlings in Gladeview?

A. I got hit by a book.

Q. Who was holding the book when you were hit by it?

A. The principal.

Q. Where did he hit you?

A. On my butt.

Q. Do you remember the reason for that?

A. No.

Q. You say you went to Madison Junior High School; is that right?

A. Yeah.

Q. What grade did you start Madison at?

A. Seventh.

Q. Did you ever receive any paddlings at Madison?

A. Yes.

Q. Do you recall specifically any paddlings?

A. Being late.

Q. For being late to class?

A. Yeah.

[117] Q. Where would you get paddled at Madison?

A. In the assistant principal's office.

Q. Who would do the paddling?

A. All of them. The man named Mr. —

Q. Tell me what position they held in the school, if you know. Were they principals, teachers, assistant principals?

A. All of them was assistant principals.

Q. How many were there?

A. Three.

Q. Were you paddled by all of them?

A. No; only by one.

Q. Do you remember his name?

A. Mr. Albert.

Q. Mr. Abbott or Albert?

A. Albert.

Q. Were you paddled by him more than once?

A. Yeah.

Q. Do you remember how many times?

A. Not exactly.

Q. Can you give us an estimate?

A. About three or four times.

Q. Were they all for being late?

[118] A. Naw; about two for late—two or three. Yeah, about three. Naw; two for late, one for fighting and one for getting accused for a stolen bike.

Q. Let me ask you this: You say you were paddled in somebody's office; is that right?

A. Yeah.

Q. Whose office was it?

A. Mr. Albert's.

Q. Do you remember—think back—do you remember any of these paddlings specifically and who was present when you were being paddled?

A. Just Mr. Albert.

Q. On every one of these occasions, only Mr. Albert was there?

A. No; when the lady was there whose son or boy had stole his bike, she was the only one present then when I got paddled.

Q. Tell me about that. You say you stole a bike?

A. No. Alvin stole it, a friend of mine.

Q. How did you wind up getting paddle?

A. Somebody saw me and him on it, so we were called—they called us into the office the next [119] day and we got a paddling for it.

Mr. Albert said she could have pressed charges against us, but she didn't. She wanted us to get punished, so we got a paddle.

Q. You say this was in the seventh grade?

A. Yeah.

Q. That was the 1969-70 school year; is that correct?

A. I don't remember.

Q. I want to go over it again.

You specifically remember this paddling for the stolen bike?

A. Yes, sir.

Q. I want you to think carefully and tell me exactly who was present in the assistant principal's office.

A. Mr. Albert, a lady and her son and Alvin and me.

Q. No other adults were there?

A. No.

Q. Was the principal there?

A. No.

Q. Were you taken to the principal before you got a paddling?

[120] A. No.

Q. Do you remember how many licks you received?

A. About five.

Q. Did they hurt?

A. Yeah.

Q. Was Alvin paddled?

A. Yes.

Q. Do you remember how many licks he received?

A. About ten.

Q. Did he cry?

A. Yes.

Q. Did you cry?

A. A little bit.

Q. Do you remember any other times that you were paddled by Mr. Albert? You said you were paddled about four times.

Do you remember any other times, specifically?

A. I told you for being late.

Q. Do you remember being paddled for being late, specifically?

A. Yes.

[121] Q. Can you picture the time you were being paddled?

A. Yes.

Q. Who was in the room then?

A. Just Mr. Albert and some more children who got paddled for being late.

Q. So you were all paddled for being late?

A. Yeah.

Q. Were any other adults in the room at the time?

A. No.

Q. Were you taken into the principal's office before you were paddled?

A. No, sir.

Q. Was the principal present?

A. No.

Q. Are you sure of that?

A. Yes.

Q. Do you remember being paddled on any other occasion by Mr. Albert?

A. Getting in a fight.

Q. Do you remember that paddling?

A. Yeah.

Q. Where were you paddled?

[122] A. In his office.

Q. Who was present?

A. Mr. Albert.

Q. Who else?

A. Another boy, who I had the fight with.

Q. Were you both paddled?

A. Yes.

Q. Do you remember how many licks you got that time?

A. About four apiece.

Q. Did it hurt.

A. Yeah.

Q. Were any other adults present, at that time?

A. No.

Q. Did Mr. Albert see you fighting?

A. No.

Q. How did he know you were fighting; do you know?

A. Somebody must have went to the office and told.



Q. Do you remember any other times you were paddled by anybody at Madison? Was Mr. Albert the only man that paddled you?

[123] A. That paddled me.

Q. Did you see anybody else being paddled by anybody else?

A. Yes.

Q. Who?

A. By a man named—I forget his name.

Q. Who was he?

A. He was an assistant principal.

Mr. HOWARD. Your Honor, excuse me. Unless we have some proof about whether there was authority or no authority, it seems to me that just his seeing other people paddled doesn't prove anything here.

If they are going to get into everything—

The COURT. Does this have to do with the policy of corporal punishment?

Mr. FEINBERG. No. The purpose of this testimony will be the purpose of much other testimony to show these regulations are not followed; they are ignored.

The COURT. Merely the fact that someone else—he saw someone else get a spanking, you are showing he was not in the principal's office?

[124] Mr. FEINBERG. I don't know what he was going to say. I don't think I'm putting words in his mouth.

For example, if he saw somebody paddled on the PE field, I think that would be evidence that there was.

The COURT. So you propose to follow up with other questions along that line?

Mr. FEINBERG. Yes.

The COURT. All right, sir.

By Mr. FEINBERG:

Q. My questions to you was, you said you saw somebody else paddled; is that right?

A. Yeah.

Q. Who was the person that was doing the paddling? You say you can't remember his name?

A. He was tall and dark. He was colored. He had a black Cadillac.

Q. That isn't my question.

Who was he in the school; was he a teacher?

A. Assistant principal.

Q. Do you remember where the paddling took place?

[125] A. In his office.

Q. How come you saw it?

A. All three of them, Mr. Albert's office here, another assistant's office here, and another one right here, and these doors be open.

When you come in the office, you are sitting right down looking in his door.

Q. That's when you saw this paddling.

Did you see more than one?

A. Yes. I see lots of them.

Q. You have seen lots of people paddled in there; is that right?

A. Yeah.

Q. Did you see anybody cry as a result of these paddlings?

A. He paddled a girl.

Q. You saw the girl being paddled?

A. Yes.

Q. Did they cry?

A. Yes.

Q. Do you remember how they were standing when they were being paddled?

A. Straight.

Q. What did he use to paddle them with?

[126] A. A board.

Q. Commonly referred to as a paddle, in the school system?

A. Yeah.

Q. How long did you stay at Madison?

A. For a whole year.

Q. Have you told me about all the paddlings you either received or observed at Madison? Can you think of any others?

A. No.

Q. Where did you go from Madison?

A. I went to Madison from the beginning of the school year.

Q. Where did you go from Madison? What was the next school you went to? That was in the seventh grade, right?

A. Yeah.

Q. Where did you go to the eighth grade?

A. Madison.

Q. You went to Madison in the eighth grade?

A. Yes. Yeah; I think so.

Q. When did you go to Drew? What grade were you in at Drew?

A. Eight.

[127] Q. Were you at Drew for the whole time during the eighth grade?

A. No.

Q. You started at Madison; is that it?

A. Yes, and then I went to Drew.

Q. You were only at Madison for a few days, though; isn't that right?

A. Yeah.

Q. So for the most of the ninth grade, you were at Drew; is that right?

A. Yes.

K. Did you stay at Drew through the whole ninth grade?

A. That was the eighth.

Q. The whole eighth grade, did you stay at Drew?

A. No. For about—I don't know how long.

Q. Where did you go after Drew?

A. To Horace Mann.

Q. Did you finish the eighth grade there?

A. Yes.

Q. Did you go through the ninth grade?

A. Yes; Miami Central.

Q. Let's talk about Drew. You were in [128] Drew for a half of the eighth grade or so, or more?

A. About a half. Maybe a little bit more.

Q. Who was the principal at Drew when you were there?

A. Mr. Wright.

Q. The man you see in the audience?

A. Yeah.

Q. Can you point the man out?

A. Mr. Wright, right there.

Mr. FEINBERG. Let the record reflect that Mr. Wright is being pointed out. He is sitting next to his attorney, Mr. Spicer.

By Mr. FEINBERG:

Q. Do you remember who the assistant principal was at Drew?

A. Mr. Deliford.

Q. Do you see him in the audience?

A. Yes.

Q. Can you point to him?

A. In the corner, right there.

Mr. FEINBERG. Let the record reflect that Mr. Deliford has been identified by the witness.

[129] By Mr. FEINBERG:

Q. Do you know if there were any other assistant principals at Drew?

A. Yes; Mr. Barnes.

Q. Do you see him in the audience?

A. Yes.

Q. Can you point him out?

A. Right by Mr. Deliford?

Mr. FEINBERG. Let the record reflect that Mr. Barnes has been identified by the witness.

By Mr. FEINBERG:

Q. Do you know if there were any other assistant principals or assistants to the principal, at Drew?

A. I'm not sure—but I don't know his name—but I think that man with the glasses.

Q. The man with the glasses. Okay.

You don't know his name; is that right?

A. No.

Q. Did you experience any paddlings at Drew?

A. Yes.

Q. Do you know how many?

A. Two.

[130] Q. Do you know by whom?

A. Yes.

Q. Who?

A. By the PE teacher and Mr. Wright.

Q. Who paddled you first; the PE teacher or Mr. Wright?

A. The PE teacher.

Q. Who is the PE teacher?

A. Mr. Wright and Mr. Kemp.

Q. They were the two PE teachers?

A. Yes.

Q. Mr. Wright that you have identified as the PE teacher, he is not the same Mr. Wright who is the principal; is that correct?



A. No.

Q. He's another Mr. Wright?

A. Yes.

Q. Were you paddled more than once by either Mr. Kemp or Mr. Wright, the PE teacher?

A. Just once.

Q. Can you remember that incident?

A. Yes.

Q. Was anybody else paddled, at that time, besides you?

[131] A. Yes; the whole class.

Q. Do you remember the reason?

A. Everybody was talking.

Q. Who did the paddling?

A. Both of them; Mr. Wright and Mr. Kemp.

Q. Tell me how they did it.

A. Lined the whole class up in two rows.

Q. They lined the class up in two rows?

A. Yes.

Q. Did they divide the class in half?

A. Yeah.

Q. What did they tell the class to do then?

A. Step up, one by one, and take a lick.

Q. Step up one by one and take a lick?

A. Yes. See, you have two lines. Mr. Wright one here, and Mr. Kemp over here, and everybody come up one by one and got a lick.

Mr. Wright put on his gloves.

Q. Mr. Wright put on his glove?

A. Yes.

Q. What kind of glove is this?

A. A leather type glove. One of them leather ones.

[132] Q. Why did he do that?

A. So it wouldn't shake. So his hand wouldn't sting when he hit you with the board.

Q. Did both Mr. Kemp and Mr. Wright participate in this paddling?

A. Yes.

Q. They each had a paddle?

A. Yeah.

Q. Do you know where they obtained the paddles?

A. They was in the office.

Q. In whose office?

A. They office; Mr. Wright's and Mr. Kemp's office.

Q. Had you ever seen these paddles before or since?

A. I seen them once. Yes, once in a while in the office on the desk.

Q. Have you ever seen anybody else paddled by Mr. Wright, the PE teacher, or Mr. Kemp?

A. Did I see—

Q. Anybody, besides this one occasion when the whole class was paddled.

A. Yes, I see people get paddled by Mr. [133] Wright before.

Q. Do you remember on how many occasions Mr. Wright paddled? The PE teacher, I am talking about.

A. Lots of times. About, at least, almost three people a week.

Q. Do you remember why he paddled people; the reason?

A. Yes; for late, talking, eating in the class, cursing.

Q. Anything else?

A. Or coming, you know, like upstairs, just caught saying names around all the white teachers upstairs, you get a paddling for that, or for fighting.

Q. Mr. Wright, the PE teacher, would paddle for all of these reasons, and you saw people paddled for all of these reasons?

A. Yes.

Mr. HOWARD. Your Honor, I think he is leading his witness.

Mr. FEINBERG. I think he testified to that.

The COURT. If he did, you are [134] repeating the testimony.

By Mr. FEINBERG:

Q. Let me ask you this: When the whole class was paddled by Mr. Wright and Mr. Kemp, do you know whether Mr. Wright or Mr. Kemp consulted with the principal before paddling the class?

A. They didn't.

Q. How do you know that?

A. Because they—the first time they told us to shut up and everybody kept talking, so they come out and told everybody to line up.

Q. Do you know whether, on any of these occasions, they consulted with the principal?

A. Not that I know of.

Q. How do you know that they didn't?

A. Because they—half the time, all they do, like if you say nigger or something, they will get you and paddle you and tell you you're going to change or either in the class they take your foot and paddle.

So they don't have time to tell the principal.

Q. Did you ever see the principal or any of the assistant principals when they were paddling [135] the students in the PE class?

A. No.

Q. You mentioned you were paddled another time by Mr. Wright, the principal; is that correct?

A. Yeah.

Q. Do you want to tell me about that?

A. Well—

Q. When did that happen; do you remember?

A. Well, in October.

Q. October of what year?

A. I don't remember what year. It was two years ago.

Q. 1970?

A. Yeah.

Q. Who paddled you; Mr. Wright?

A. Yeah.

Q. Where did he paddle you?

A. In his office.

Q. In the principal's office?

A. Yeah.

Q. Was anybody else paddled at that time?

A. Yeah.

Q. Who?

A. Some more students.

[136] Q. How many other students?

A. About eight to ten. About that many.

Q. Where had you just come from before you got to the principal's office?

A. We come from out of the auditorium.

Q. Who got you out of the auditorium?

A. Mr. Wright.

Q. The principal?

A. Yeah; he took us to his office.

Q. He took you to his office?

A. Yes.

Q. What happened? Who was the first one paddled?

A. I don't know their names.

Q. You weren't the first one paddled?

A. No; I was the last.

Q. Did you see the others paddled?

A. Yes.

Q. Were there girls and boys?

A. Yeah.

Q. They were all paddled?

A. Yes.

Q. Did any of them cry?

A. Yeah.

[137] Q. How come you were the last?

A. Because I wasn't going to get no paddle.

Q. What do you mean? I didn't understand that.

A. I didn't do nothing to get nothing for.

Q. Did you tell Mr. Wright that?

A. Yeah.

Q. What did you say to him?

A. I said I didn't do nothing but went up on the stage by accident and I ain't going to get no paddling.

Q. Did he tell you that he was going to paddle you?

A. I don't remember what he said. I don't remember exactly what he said, but he said, "You wait right here."

Q. Why did you say you were not going to take a paddling?

A. Because I didn't do nothing.

Q. How did you know you were going to be paddled?

A. Because he said so.

Q. He said he was going to paddle you?

A. Yes; he was going to paddle everybody.

[138] Q. When you saw these other students paddled, who else was in the office besides you, the students and Mr. Wright?

A. Nobody.

Q. Was Mr. Deliford in the office?

A. No.

Q. Was any other teacher in the office?

A. No.

Q. Was Mrs. Miranda in the office?

A. No.

Q. Who is Mrs. Miranda?



- A. The lady back there.  
 Q. Who was she, at that time?  
 A. Who was she?  
 Q. Yes.  
 A. Science teacher. Naw, not science; black history, or something like that teacher. She was a teacher.  
 Q. She was the teacher?  
 A. Yes.  
 Q. Was she your teacher that day?  
 A. Yeah.  
 Q. But she wasn't in the room when you were paddled; when the other students were paddled?  
 [139] A. No.  
 Q. Who was in the room when you were paddled?  
 A. Mr. Wright, Mr. Barnes and Mr. Deliford.  
 Q. What happened to the other children?  
 A. They went back into the room.  
 Q. They were sent out of the principal's office?  
 A. Yeah.  
 Q. Did you resist the paddling?  
 A. Yes.  
 Q. Do you remember if he told you how many times he was going to beat you?  
 A. Started off with five, and then he went up to twenty.  
 Q. Did he eventually paddle you?  
 A. Yes.  
 Q. Did you physically resist it?  
 A. Yes.  
 Q. How did he paddle you, if you resisted it?  
 A. They took off their coats when they come in.  
 [140] Q. Who were "they"?  
 A. Mr. Deliford, Mr. Barnes and Mr. Wright.  
 Q. They took off their coats?  
 A. Yes, and their watches.  
 Q. Then what did they do?  
 A. Told me to take the stuff off my pockets and take off my coat.  
 Q. Take the things out of your pockets?  
 A. Yes; my back pockets.  
 Q. What kind of coat were you wearing?  
 A. A blue jean jacket.  
 Q. They told you to take that off?

- A. Yes.  
 Q. Then what did they tell you to do?  
 A. "Stoop over and get your licks."  
 Q. Show me how they showed you to do that.  
 A. Over there?  
 Q. Yes.  
 A. Told me to get like this, and then I wouldn't take no—  
 Q. Did you do that when they told you to do it?  
 A. No.  
 Q. What did you do?  
 [141] A. I stand up.  
 Q. Then what happened?  
 A. Then they grabbed me; took me across the table.  
 Q. Who were "they"?  
 A. Mr. Deliford, Mr. Barnes and Mr. Wright.  
 Mr. FEINBERG. Let the record reflect that the witness was directed to lean over the table on his hands, on the table, and he has shown us how he was directed to do that.  
 By Mr. FEINBERG:  
 Q. You say Mr. Barnes and Mr. Deliford did what?  
 A. Put me across the table.  
 Q. Show me how they did that.  
 A. Like this here; across this way.  
 Q. Is that exactly how you were? Show us exactly how you were.  
 A. Across the table, like this.  
 Q. Did they put you on the table like this?  
 A. Yes.  
 Mr. FEINBERG. Let the record reflect the witness is lying prone, face down, across the [142] table, with his feet off the floor.  
 By Mr. FEINBERG:  
 Q. Who held you there?  
 A. Mr. Barnes and Mr. Deliford.  
 Q. Who held what?  
 A. Mr. Barnes held my legs and Mr. Deliford held my arms.  
 Q. Who paddled you?  
 A. Mr. Wright.  
 Q. You said he was going to give you how many licks?  
 A. Twenty.  
 Q. How many did he give you?

A. More than twenty.

Q. How do you know that?

A. Because I was counting them.

Q. You counted each and every one?

A. Just about.

Q. You are sure he gave you that many?

A. I know he gave me more than twenty, because if he gave me twenty—there was more than twenty, I know; I was counting. For every time I'd count one, it was at least two.

Q. Did it hurt?

[143] A. Yes, it hurt.

Q. Did you cry?

A. Yeah.

Q. How old were you at the time?

A. Thirteen or fourteen. I was fourteen.

Q. What happened after he finished paddling you? What did he say to you, if anything?

A. He told me to go wait.

Q. Did Mr. Wright say anything to you after you were paddled?

A. To put on my clothes.

Q. Mr. Wright told you to put on your clothes?

A. Yes.

Q. Where were your clothes?

A. My coat was on—I forget where it was, but my pick was on the ground.

Q. When you say your "pick", that is a comb for your hair?

A. Yes.

Q. Did you have a wallet?

A. No.

Q. He said, "Put on your clothes." Then what did he say to you?

[144] A. "Wait outside of the office."

Q. Did you wait where he wanted you to wait?

A. Wait by the secretary's desk; outside of his office by the secretary's desk.

Q. Did you have to open the door to get out there?

A. He opened the door and told me if I move—I said I was going home—he said if I move he was going to bust me on the side of my head.

Q. Did you see what Mr. Barnes and Mr. Deliford did after they finished?

A. They were putting back on their watches and their coat. Then they closed the door and then I left.

Q. Then you left?

A. Yes.

Q. Where did you go?

A. Home.

Q. Was it at the end of the school day?

A. No; it was during the school.

Q. Why did you go home?

A. To tell my mama what happened, but she wasn't home.

[145] Q. Do you remember about what time of day that was?

A. About—

Q. In the morning or afternoon?

A. In the afternoon.

Q. You say your mother wasn't home. Was anybody home when you got home?

A. My sister, and I told—I didn't tell her nothing. I just went upstairs to the bathroom.

Q. What did you do in the bathroom?

A. To look to see how bad I was hit.

Q. What did you see? Where did they hit you?

A. Across my butt; hit me on my arm, and across my eye.

Q. Was there any evidence of the hit across your arm, any physical evidence? Could you see anything?

A. Swollen.

Q. What about across your eye?

A. They weren't no mark there. It was just hurt.

Q. What about your buttocks; could you see that?

[146] A. Yes.

Q. How did you look at that?

A. On our mirror. We got a big mirror, and I turned my back against it and looked.

Q. What did you see?

A. Black and purple and it was tight and hot.

Q. Did your mother eventually come home?

A. Yes.

Q. Did you tell her about it?

A. First I was scared to tell her, but then I told her.



- Q. Why were you afraid to tell her?  
 A. Kind of ashamed to show her.  
 Q. But you did show her?  
 A. Yes.  
 Q. How did she react?  
 A. She start screaming and hollering.  
 Q. Did she say anything?  
 A. She said, "What happened to my child?"  
 Q. I didn't hear that.  
 A. She talking about, "Oh, what happened to my child?"  
 Q. Then what happened?  
 [147] A. She took me to the doctor and started screaming and hollering.  
 Q. Excuse me?  
 A. She took me to the doctor.  
 Q. What was the last thing?  
 A. She started screaming and hollering.  
 Q. Your mother?  
 A. Yes.  
 Q. You say your mother was hysterical?  
 A. Yes.  
 Q. Which doctor did you go to?  
 A. Jackson.  
 Q. How did you get there?  
 A. My daddy, I think—naw. I don't know.  
 Q. Were you examined at Jackson by a physician?  
 A. Yes.  
 Q. Were you given any medication?  
 A. Yes. First I—at first he told me I had a fever. He thought I had drunk some coffee.  
 Q. You say, "at first". What did he do, take your temperature?  
 A. Yes, and I had a fever.  
 Q. What else did he do to you besides take [148] your temperature. Did he examine your buttocks?  
 A. Yes. He said my mama should go and arrest the man that did it.  
 Q. Just answer the questions that I am asking you. Aside from that, what did he do? I'm not asking you what he said.  
 A. Just examined me and give some medicine.  
 Q. What kind of medicine did he give you?  
 A. Pain and—

- Q. Pills?  
 A. Yes.  
 Q. Go on. What else?  
 A. And the kind that make you—like a laxative; and sleeping pills.  
 Q. Do you recall if he told your mother to treat you, in any way?  
 A. Yes; put cold compresses and give me those pills.  
 Q. The next day, did you go back to school?  
 A. No.  
 Q. Did the doctor tell you anything about going back to school?  
 A. Told me to stay out at least a week.  
 [149] Q. Did you, in fact, stay out of school?  
 A. Yes.  
 Q. What did you do when you stayed out of school?  
 A. I had to go—my mommy took me to another doctor.  
 Q. I'm not up to that. Where did you stay when you stayed out of school?  
 A. Home.  
 Q. What did you do at home?  
 A. Laid down in bed.  
 Q. Did you lay on your back?  
 A. On my stomach.  
 Q. Why?  
 A. Because my butt hurt if I laid on my back.  
 Q. Could you sit down?  
 A. No.  
 Q. How long was it before you could sit down?  
 A. Going on the third week.  
 Q. Before you could sit comfortably?  
 A. Yes.  
 Q. You mentioned that you went to another [150] doctor.  
 A. Yes.  
 Q. Where was that?  
 A. Family Health Clinic. Family Health Center.  
 Q. That's not the same place you went to the first time?  
 A. No.  
 Q. Do you recall whether you received any treatment there?  
 A. Yes. The doctor examined me again and told me I had to stay home for another few days and give my mommy

something. I don't remember. Told me to keep putting cold compresses to it.

Q. Did you mother put cold compresses on it?

A. Yes; every night.

Q. Did you play while you were out of school that time?

A. No.

Q. Did you tell anybody about it? Did anybody find out about it; any of your friends?

A. No.

Q. How about your brothers and sisters; [151] did they know about it?

A. Yeah.

Q. What did they say about it?

A. Called me "rain bummy".

Q. Was that in reference to your buttocks?

A. Yeah.

Q. Were they making fun of you?

A. Yeah.

Q. How did you feel about that?

A. I plugged them in their face.

Q. You were angry about that?

A. Yes.

Q. How long did that go on?

A. Still going on now.

Q. Did you see any other doctors? Did you go to any other hospital, besides the two you have told us about?

A. That's all I remember.

Q. Excuse me?

A. That's all I remember going to; those two.

Q. Do you remember approximately how long you were out of school, or exactly how long you were [152] out of school?

A. At least a week and a few days.

Q. Let me ask you this, now: Did you ever see anybody in the school walking around with a paddle?

A. Yes.

Q. Who?

A. Mr. Barnes and another man, three of them.

Q. You saw three people walking around with a paddle?

A. Yes.

Q. Do you remember the names of the other two, besides Mr. Barnes?

A. No.

Q. Was it anybody here in the courtroom?

A. No. Mr. Barnes.

Q. Where did you see Mr. Barnes with the paddle?

A. Upstairs.

Q. Where, upstairs?

A. In the big open area room.

Q. What do they call that room?

A. The loft.

[153] Q. Do they hold classes in the loft area?

A. Yes.

Q. You say you saw Mr. Barnes there. What were you doing when you saw Mr. Barnes with a paddle?

A. In my class.

Q. How often did you see him with a paddle?

A. Just about every day.

Q. Where would he be going?

A. Just walking around.

Q. Would he be walking into the classrooms?

A. The class would be open and he would be walking through them.

Q. You mean one class here, one class here?

A. Yeah.

Q. Were they separated by walls?

A. Just removable walls, but most of them they would be open.

Q. You say Mr. Barnes was walking through each class?

A. Yes.

Q. How often did you say you saw him?

[154] A. Just about every day.

Q. Did he eventually stop carrying the paddle around, if you remember?

A. Not that I can remember.

Q. Did you ever see him paddle anybody as he was walking through?

A. You mean in the open area of the loft?

Q. Yes.

A. No.

Q. What about the other people you saw carrying the paddles around; did they carry it in the same place or another place?

You say you saw three people carrying them?



A. Another man would be carrying it downstairs and then there would be another one outside by the cafeteria.

Q. The cafeteria was outside?

A. The cafeteria inside, but outside where you wait at before your teacher picks you up.

Q. When you say "outside", you mean outside of the school building?

A. Yes.

Q. You mean out in the open?

[155] A. Yes.

Q. This was after you finished eating you are supposed to congregate at a certain place?

A. Yeah.

Q. You saw this man, whose name you don't know, carrying a paddle out in that area?

A. Yeah.

Q. Did you ever see him paddle anybody out there?

A. No.

Q. How often did you see him carry the paddle around out there?

A. Just about every day.

Q. Let me ask you this: This paddling that you received from Mr. Wright, the principal, did the injuries that you received from them eventually clear up?

A. What you mean?

Q. In other words, are you fully recovered from the injuries?

A. Do I have any pains?

Q. Yes.

A. No.

Q. How long after the paddling did you [156] have pain?

A. You mean after it don't go, how long?

Q. How long after the paddling; for what period of time?

A. Oh; about three weeks.

Q. After the three weeks, you had no more pain; is that right?

A. Yes.

Q. You have no lingering effects of that paddling; is that right?

A. Yes.

Mr. FEINBERG. No further questions.

## CROSS-EXAMINATION

By Mr. HOWARD:

Q. James, how tall are you?

A. I don't know.

Q. You are not quite six feet, are you?

A. I don't know.

Q. How much do you weigh; do you know that?

A. Two hundred pounds.

Q. About how much did you weigh back when you were at Drew?

A. One hundred and twenty.

[157] Q. One hundred twenty?

A. Yes. Oh, about thirteen, I weighed about one hundred twelve. I remember I used to quit losing that twenty pounds.

Q. You have gained eighty pounds in two years?

A. That's what it looked like.

Q. Going back to Gladeview Elementary, you said you had been paddled some time in elementary school?

A. Yeah.

Q. You went to see the counsellors, didn't you, as early as that, back when you were in elementary school?

A. I went to see the counsellor.

Q. Do you remember talking to the counsellors about your conduct and about how you were supposed to behave in school, and that sort of thing?

A. You mean did we have counsellors and I talked to them?

Q. Did you talk to either your teachers or the principal or separate counsellors about your behavior and how you were supposed to act in school?

A. Nope.

[158] Q. Are you sure about that?

A. Yeah.

Q. Do you remember that you were suspended once back in Gladeview, for five days? Do you remember that?

A. For what?

Q. According to the school's notice, because you didn't behave in the classroom; you did not show any respect for a substitute teacher; continued the practice, even after several counselling sessions.

Do you remember that now?

A. Yeah.

Q. Five days' suspension?

A. Yeah.

Q. Do you remember, again in Gladeview, you were suspended for two days because you brought a knife to school?

A. I don't remember that. Two days for a knife?

Q. Yes; bringing a knife to school.

A. Oh, yeah.

Q. You were suspended two days then?

A. Yeah.

[159] Q. Did the principal talk to you about that? Did you talk to a counsellor?

A. Not as I remember talking to a counsellor.

Q. About the way you were acting in school?

A. No.

Q. When you went into Drew, in the eighth grade, do you remember talking to a counsellor then whose name is Hart, either Mr. or Mrs. Hart, about the rules of the school and how you were supposed to behave in school?

A. Yeah.

Q. Do you remember that?

A. Yes.

Q. Do you remember, just after you had started at Drew, that Mr. Barnes had a talk with you because you had been running in the hall without a pass, and you were chewing gum and using bad language in the hall?

Do you remember that?

A. No.

Q. You don't remember talking to Mr. Barnes about that kind of conduct?

[160] A. About chewing gum?

Q. About chewing gum and using profanity and being disrespectful.

A. Being in the hall without a pass. Not no disrespectful.

Q. Do you remember Mr. Barnes calling you down for it, though?

A. Yeah.

Q. You do remember at least about chewing gum, but you don't remember the other part of it, do you?

A. Right.

Q. Don't you remember kind of using some bad language at Mr. Barnes when he stopped you?

A. Nope.

Q. You didn't say something like, "You better not put your damn hands on me"? Did you say something like that to him?

A. No.

Q. About the same time—now, this is before Mr. Wright paddled you I'm talking about—just after you had entered Drew, do you remember another time when Mr. Deliford had a talk with you about making noise in the hall; making a disturbance in the [161] hall?

A. Nope.

Q. You don't remember having any talk with Mr. Deliford?

A. About making noise in the hall?

Q. Yes; about your behavior.

A. Making noise in the hall?

Q. Do you remember having a talk with Mr. Deliford about anything? Let me ask you that. Before you were paddled by Mr. Wright.

A. No.

Q. Do you remember your teacher talking to you, from time to time, about your conduct, about the way you were acting, both at Gladeview and then at Madison and then at Drew?

A. My teacher?

Q. Teachers or the people in the principal's office.

A. From Gladeview on up to Drew, do I remember any of them talking to me?

Q. Yes.

Mr. FEINBERG. Your Honor, I don't object to this kind of questioning, but I think this question in particular is too general. Does he [162] remember teachers talking to him. It is not calculated to elicit a responsive answer.

The COURT. He doesn't like your question, Mr. Howard. Do you want to ask a different one?

Mr. FEINBERG. If he wants to name specific incidents, I have no objection.

By Mr. HOWARD:

Q. Isn't it a fact that from time to time you had some trouble in Gladeview? You were suspended; do you remember?

A. Yeah.



Q. You had some trouble as you went along. Isn't it a fact that your teacher or your counsellors or somebody from the principal's office would talk to you about your conduct?

A. Yes.

Q. They would try to point out what was wrong and how they wanted you to behave in school?

A. Yes.

Q. You said that your PE teacher, Mr. Wright, at Drew, and another PE teacher had paddled the class in two lines?

A. Yeah.

[163] Q. You were in one of those two lines?

A. Yeah.

Q. You only got one lick that time, didn't you?

A. Yeah.

Q. Was that what happened to the rest of the boys, too?

A. Yeah.

Q. One lick each?

A. Yeah.

Q. Were you particularly ashamed and embarrassed with everybody in the whole class getting one lick?

A. No; because everybody got a lick.

Q. When Mr. Wright paddled you in his office, isn't it a fact that you and Broderick Jones, he had brought the two of you together to his office from the auditorium or from the loft?

A. No.

Q. Wasn't Broderick Jones the other boy on the stage with you that wasn't supposed to be there?

A. I don't know. I don't remember his name.

Q. You don't know his name?

[164] A. No.

Q. There were three boys on the stage, weren't there, at the time Mr. Wright came in and called you down?

A. Yeah—I don't know how many people. Yeah, about three.

Q. One of the boys Mrs. Miranda had told to be there to run the machine, correct?

A. Yeah.

Q. You were not supposed to be there?

A. Right.

Q. The other boy that went with you to the office was not supposed—

Mr. FEINBERG. Your Honor, I think I am going to object to the leading questions. I think he can elicit this testimony without putting words in the witness' mouth.

The COURT. Overruled. This is cross-examination.

By Mr. HOWARD:

Q. Aside from the boy who was supposed to run the machine, you and the other boy that went to the office were not supposed to be on the stage, were you?

[165] A. Right.

Q. Mr. Wright came in and called you down from the stage?

A. He didn't call me down from the stage.

Q. How did you get down to go with him to the office?

A. Miss Miranda told me to come off the stage.

Q. You didn't go down when she told you?

A. I was on my way down when he come in. He saw me coming down off the stage.

Q. Didn't she tell you three times to leave the stage and you wouldn't go?

A. She wasn't talking just to me; she was talking to all of them to get off the stage. While she was saying that, I was on my way off the stage.

Q. She said it three times?

A. I don't know how many times she said it.

Q. Mr. Wright was there while she was talking to you all, wasn't he?

A. Yes, he had just come in.

Q. You used some pretty bad language to Mr. Wright as you were going back to the office with him, didn't you?

[166] A. No.

Q. Did you say anything while you were going back with him to the office?

A. No.

Q. I want you to remember, now.

A. I'm thinking. There wouldn't be no need for me to curse at him, if I did.

Q. Weren't you hollering and complaining that you didn't want to take any paddling?

A. No, I wasn't hollering. I just said, "I ain't going to get no paddling."

Q. How did you say it to him?

A. "I ain't getting no paddling because I didn't do nothing."

Q. Is that the way you said it?

A. Yeah.

Q. Did you use some pretty bad language?

A. No.

Q. You didn't use words like "mother fucker"—

A. No.

Q. —at any time that day, to Mr. Wright?

A. No.

Q. You say he started, he began with five [167] licks to you and then you said he went on up to something like twenty?

A. Yes.

Q. If he began with five, why did he go beyond five?

A. He said, "The longer you take, the more it going to be."

Q. He said what?

A. "The longer you take, the more it going to be," so I just sat there and let it go, because I ain't going to get no licks for nothing.

Q. Didn't he say that he was going to give you licks beyond five because you were using bad language?

A. No.

Q. Tell me again why did he give you more than five licks?

A. Because he said—

Mr. FEINBERG. Your Honor, I think he has answered that question already. I think it is repetitious.

Mr. HOWARD. I didn't hear exactly what he said, or I didn't understand.

Mr. FEINBERG. I heard him, and I am [168] sitting back there.

The COURT. I heard him, too.

The WITNESS. "The longer you wait the more it going to be."

By Mr. HOWARD:

Q. "The longer you wait"?

A. "The more it going to be."

Q. What did he mean; you were supposed to leave? If you stayed there he was going to give you more licks?

Mr. FEINBERG. Counsel is arguing with the witness. I think it is clear what the answer is. I understand the answer. I think Mr. Howard does.

Mr. HOWARD. I will withdraw it. Everybody understands it but me, but I don't think it is that important.

By Mr. HOWARD:

Q. You weren't trying to say a while back that Mr. Wright deliberately hit you on the arm?

A. No, he wasn't deliberate.

Q. You were jerking around on the table and one of the licks hit you on the arm?

A. Yeah.

Q. When you said you saw Mr. Barnes [169] walking through the loft, Drew is what they call an open school, isn't it, James? Do you know about that?

A. Yes.

Q. Doesn't that mean that instead of being in little classrooms, separate classrooms, that everybody is pretty much in the open, with different groups studying in this one big area?

A. Yes.

Q. Is that the way it worked at Drew?

A. Yes.

Q. So whoever would walk around anywhere, you would be able to see him, right; whatever he was carrying?

A. Yeah.

Q. You didn't finish the eighth grade at Drew, right?

A. No.

Q. You went on to Horace Mann?

A. Yes.

Q. Did you pass at Horace Mann?

A. Yes.

Q. You went on, then, to—

A. Senior high school.

[170] Q. Are you in senior high school now?

A. Right now?

Q. Yes.

A. No.

Q. You are not in school now?

A. No.

Q. Why not?

A. Because I'm working.



Q. You are working?

A. Yeah; I'm at the Juvenile Building for threatening a teacher and I got sentenced to this program called day field, so I got to work.

You know, I got committed there at the Juvenile—

Mr. HOWARD. No further questions.

The COURT. You are excused.

[171-253]

[254]

Thereupon:

ROOSEVELT ANDREWS was called as a witness in his own behalf, and having been first duly sworn, was examined and testified as follows:

#### DIRECT EXAMINATION

By Mr. FEINBERG:

Q. State your name, please.

A. Roosevelt Andrews.

Q. Where do you live?

A. 2280 Northwest 50th Street.

Q. Who do you live there with?

A. Mother and father.

Q. Any brothers and sisters?

[255] A. Yes.

Q. How many?

A. Five sisters and two brothers.

Q. Where did you go to elementary school first?

A. Carver Ranches Elementary.

Q. Where is that?

A. West Hollywood.

Q. In Broward County?

A. Yes.

Q. Where did you go after that time?

A. North County.

Q. North County Elementary?

A. Yes.

Q. Where is that?

A. Carol City.

Q. In Dade County?

A. Yes.

Q. After that?

A. Bunche Park Elementary.

Q. After that?

A. North Dade Junior High.

Q. What grade were you in in North Dade Junior High School?

[256] A. Seven and a half and eight.

Q. After that?

A. Brownsville Junior High.

Q. How long were you there?

A. Half of the eighth.

Q. The other half of the eighth grade?

A. Yeah.

Q. After that?

A. Charles Drew.

Q. Junior High School?

A. Yeah.

Q. What grade were you in there?

A. Ninth.

Q. All of the ninth?

A. Yes.

Q. Did you go to high school?

A. North Miami Beach.

Q. Did you go to any other schools, other than those that you have mentioned?

A. No.

Q. Starting with North County Elementary School, which is the first school you went to in Dade County—is that right?

A. Yes.

[257] Q. Did you ever receive a paddling at that school?

A. Yeah; on the hands.

Q. What grade?

A. Second.

Q. Any other grades?

A. The third.

Q. Any others?

A. No.

Q. Can you specifically recall those paddlings and the reasons for them?

- A. Not right now.
- Q. Do you remember who paddled you?
- A. No.
- Q. The next school you went to is Bunche Park, right?
- A. No.
- Q. After North County, isn't it Bunche Park?
- A. No.
- Q. What school did you go to after North County Elementary?
- A. Bunche Park.
- Q. Were you ever paddled in Bunche Park?
- [258] A. Yeah.
- Q. Do you remember who paddled you there?
- A. The fifth grade teacher.
- Q. Do you remember his name?
- A. Mr. Conn.
- Q. What did he paddle you with?
- A. A board.
- Q. Where did he hit you?
- A. In the rear end.
- Q. On your rear end?
- A. Yeah.
- Q. Do you remember why he paddled you?
- A. Being late.
- Q. Any other reasons?
- A. Hollering out one day.
- Q. Where did he paddle you?
- A. In the classroom.
- Q. Were there other students in the classroom?
- A. Yeah.
- Q. In front of the entire class; is that what you are telling us?
- A. Yeah.
- Q. You were the only one who was paddled [259] in the fifth grade?
- A. Nope.
- Q. How many others were paddled; do you know?
- A. I don't know how many, but lot of them. Just about all of them.
- Q. Just about all the kids in the fifth grade were paddled by Mr. Cohen?
- A. Yes.

- Q. Did anybody cry?
- A. Sometimes.
- Q. Did you ever cry?
- A. No.
- Q. Were you in the sixth grade at Bunche Park?
- A. Yeah.
- Q. Do you ever recall being paddled in the sixth grade?
- A. Yeah.
- Q. When Mr. Cohen paddled you, were there any other teachers in the classroom?
- A. Nope.
- Q. Were there any other adults in the classroom?
- [260] A. No.
- Q. Did he ever go out of the classroom before he paddled, to go to the principal's office?
- A. No; just call you up.
- Q. Just call you up when you were late; is that right?
- Mr. HOWARD. Your Honor, this is leading him and suggesting the answers to him.
- The COURT. Don't lead him, Counsel.
- By Mr. FEINBERG:
- Q. You say you were in the sixth grade where?
- A. Bunche Park.
- Q. Did you ever get paddled in the sixth grade?
- A. Yeah, on my hands.
- Q. Do you remember by whom?
- A. I forget the name. It was a lady.
- Q. Where did she paddle you? I mean, where, in the school, did she paddle you?
- A. In the classroom.
- Q. Who else was in the classroom at the time?
- A. Rest of the students.
- [261] Q. Did she ever hit anybody else on the hands?
- A. Yeah; that's all she do is hit you on the hands.
- Q. What did she use?
- A. A ruler.
- Q. Did it hurt?
- A. Sometimes.
- Q. Do you remember what reasons she did that for?
- A. Same, mostly, being late, like when you go to lunch and don't get back on time, for that; and if you don't do your work and mess around.



Q. Do you remember if she consulted with the principal before she did that?

A. I don't know.

Q. Were there any other teachers present in the room when she paddled you?

A. Nope.

Q. Any other adults in the room present when she paddled you?

A. No.

Q. That was the sixth grade.

Now, where did you go in the seventh [262] grade?

A. North Dade Junior High School.

Q. Do you remember being paddled there?

A. Yes.

Q. Who paddled you there?

A. Miss Williams.

Q. Who is she?

A. Social studies teacher.

Q. Mrs. Williams, did you say?

A. Yeah.

Q. Where did Mrs. Williams paddle you?

A. In the classroom.

Q. Were there other students present in the classroom?

A. All of them.

Q. Were you the only one that was ever paddled by Mrs. Williams?

A. No.

Q. Who else was paddled?

A. Some more children.

Q. When you say "paddled", what do you mean? What was used?

A. A board.

Q. Where did she get the board from?

[263] A. Off her desk.

Q. Do you recall if any other adults were present in the classroom when the paddling took place?

A. One time in the eighth grade.

Q. I'm not talking about the eighth grade; I'm talking about the seventh grade with Mrs. Williams.

A. No.

Q. Do you recall the reason she paddled people?

A. Playing around, fighting, hollering, arguing with each other, not working when you supposed to, talking back to her.

Q. How would she paddle you? Did she make you assume any kind of position?

A. Just stand up straight.

Q. Stand up in your seat?

A. Stand up by your desk.

Q. Did it hurt; do you remember?

A. No, not me.

Q. Did it hurt anybody else?

A. Yeah; some girls.

Q. How do you know that?

A. They were crying. Hollering, rather.

Q. This was in the classroom?

[264] A. Yeah.

Q. Do you remember any other teachers who paddled you, besides the teachers whom you named; Mr. Cohen and Mrs. Williams, in those grades?

A. From fifth on up?

Q. Yes; fifth, sixth and seventh.

A. Most of them I don't remember their names.

Q. Who were they?

A. I don't know.

Q. What positions did they hold in the school?

A. PE.

Q. By "PE", what do you mean?

A. Seventh grade.

Q. By "PE", you mean what?

A. PE class.

Q. Phys ed class?

A. Yeah.

Q. Which grade was this?

A. Seventh. I didn't get a beating from him, though, not in his class.

Q. Did you see him beat anybody in the seventh grade?

[265] A. Yeah, lot of people.

Q. You are talking about at North Dade, right, in the seventh grade?

A. Yeah.

Q. Where would he get the paddle from?

- A. I seen him get it off his desk, out of his desk drawer.  
 Q. Have you seen him get it out of his desk drawer?  
 A. Yeah.  
 Q. Do you recall why he paddled students?  
 A. Sometimes like a lady teacher, she will call him.  
 Q. Excuse me?  
 A. Like a lady that don't want to whip you or something like that, she call him.  
 Q. Did that ever happen to you?  
 A. One time.  
 Q. Do you remember who the lady teacher was?  
 A. Mrs. Williams.  
 Q. Is she the one who paddled you before, though?  
 A. Yeah.  
 [266] Q. Where did the PE teacher paddle you, at her request?  
 A. In his office?  
 Q. You mean the PE teacher's office?  
 A. Yeah.  
 Q. Did he take you to the principal's office at that time?  
 A. Nope.  
 Q. Who was present in the PE teacher's office when you were paddled?  
 A. Him and Miss Carter and the other PE teacher.  
 Q. Miss Carter is who?  
 A. PE teacher.  
 Q. You mean Mr. Carter?  
 A. Yes.  
 Q. Do you recall ever being paddled on other occasions by this same PE teacher or other PE teachers in North Dade?  
 A. Nope.  
 Q. Did anybody else paddle you at North Dade?  
 A. Assistant principal.  
 Q. Do you remember how many times he [267] paddled you?  
 A. Once.  
 Q. Do you remember what it was for?  
 A. Running around the field when I was suppose to be at lunch.  
 Q. Do you remember where he paddled you?

- A. In his office.  
 Q. Where was that; in the school?  
 A. Yeah.  
 Q. Do you remember if he took you to the principal's office first?  
 A. She was there.  
 Q. The principal was present?  
 A. Yeah.  
 Mr. HOWARD. I thought he said the principal did the paddling.  
 The WITNESS. I said the assistant principal.  
 By Mr. FEINBERG:  
 Q. That was a female principal at North Dade; is that what you are telling us?  
 A. Yes.  
 Q. She was present during this paddling?  
 A. Yeah.  
 [268] Q. Do you recall ever being paddled on other occasions by this assistant principal?  
 A. Nope.  
 Q. Do you recall any other—you were at North Dade in the seventh and half of the eighth grade?  
 A. Yeah.  
 Q. Do you recall any other paddlings you received in North Dade Junior High, other than what you have told us already?  
 A. Through the eighth grade?  
 Q. The seventh and half of the eighth in North Dade Junior High, I want you to think; were there any other paddlings that you might have received, other than what you have told us?  
 A. In the eighth grade.  
 Q. At North Dade?  
 A. Yeah.  
 Q. Who paddled you there?  
 A. I don't know his name.  
 Q. Who was he in the school? What position did he hold?  
 A. I don't know that either.  
 Q. Where did he paddle you in the school?  
 A. In the classroom. It was an empty [269] room.  
 Q. It was an empty classroom?



- A. Yeah.
- Q. Do you remember the reason why you were paddled by him?
- A. Fighting.
- Q. Did he see you fighting?
- A. Yeah.
- Q. Was the other boy paddled, who was fighting with you?
- A. Yeah.
- Q. Were you both paddled in the empty classroom?
- A. Yeah.
- Q. Where did he get the paddle from?
- A. I don't know. He just went out and come back with it.
- Q. Were any other adults present in this empty classroom when you were paddled?
- A. No.
- Q. Any other students present?
- A. Just us two.
- Q. Just you and the paddler?
- A. And the other boy.
- [270] Q. Do you remember how many licks you got that time?
- A. Three.
- Q. You testified that you went, then, to half of the eighth grade at Brownsville?
- A. Yeah.
- Q. Do you remember receiving any paddlings in Brownsville?
- A. Yeah.
- Q. By whom?
- A. Mr. Cooper.
- Q. Who else?
- A. Miss Williams.
- Q. That's a different Miss Williams?
- A. Yeah.
- Q. Who else?
- A. That's all I know.
- Q. Who is Mr. Cooper?
- A. Assistant principal, I think.
- Q. Where did he paddle you in the school?
- A. In his office.
- Q. Who was present?

- A. Another man. I don't know his name.
- Q. Was he the principal?
- [271] A. I don't know—no, he wasn't the principal.
- Q. You don't remember who the principal was? Is that what you said?
- A. Yeah.
- Q. Who is Miss Williams?
- A. English teacher.
- Q. She paddled you in the eighth grade?
- A. Yeah.
- Q. Where did she paddle you in the school?
- A. Classroom.
- Q. What did she use to paddle you with?
- A. A board.
- Q. Did she paddle anybody else in the classroom?
- A. Sometimes.
- Q. Did you see them being paddled?
- A. Yeah.
- Q. Were there any other adults in the classroom at the time the people were paddled in that classroom?
- A. No.
- Q. Do you remember the reason you were paddled?
- [272] A. Ain't finished my work and I was back there talking, so she caught us.
- Q. On how many occasions did she paddle you in the classroom?
- A. Once.
- Q. Where did she get her paddle?
- A. Out of her drawer.
- Q. Did she leave the classroom before she paddled you?
- A. Not when she paddled me.
- Q. How soon after you didn't finish your work did she paddle you?
- A. When she found out I ain't finished.
- Q. As soon as she found out?
- A. Yeah.
- Q. How did you feel about being paddled in the classroom in the eighth grade?
- A. Normal, I guess.
- Q. Did she hurt when she paddled?
- A. Nope.

Q. Did you ever see her paddle any girls?

A. Nope.

Q. Nobody else paddled you except Mr. Cooper and Miss Williams, in the eight grade, that [273] you can remember?

A. That's all.

Q. Where did you go next; in the ninth grade?

A. Charles Drew.

Q. Were you ever paddled in Charles Drew?

A. Yeah.

Q. Do you remember how many times?

A. Nope.

Q. Can you tell us approximately how many times?

A. Naw.

Q. Was it more than five?

A. Yeah, it was more than five.

Q. More than ten?

A. I think so. I don't know.

Q. Did you stay at Charles Drew for the entire ninth grade?

A. Yeah.

Q. Can you remember any specific times that you were paddled at Charles Drew?

A. What you mean?

Q. Can you remember who paddled you at Charles Drew?

[274] A. Oh.

Q. Give me the names of all the people that paddled you at Charles Drew.

A. Mr. Challenger [phonetic].

Q. Who else?

A. Mr. Wright.

Q. Which Mr. Wright?

A. Both of them; the principal and my PE teacher. Mr. Kemp.

Q. Who is he?

A. PE teacher?

Q. Yes.

A. Deliford, Barnes, and that's all I remember.

Q. Who is Mr. Challenger?

A. Sheet metal teacher.

Q. Where did he get the paddle from?

A. Out of his drawer.

Q. Did you ever see anybody else paddled by Mr. Challenger?

A. Yeah.

Q. Do you remember approximately how many people?

A. Nope.

[275] Q. Was it more than five?

A. During the whole year?

Q. Yes.

A. Yeah, it was more than five.

Q. More than ten?

A. Yeah.

Q. More than twenty?

A. Nope.

Q. When Mr. Challenger paddled you and the other people, were there ever any adults present besides him?

A. Sometime the other teacher be there—

Q. Excuse me; what kind of teacher?

A. Small English teacher, Mr. Kay.

Q. Was he in there all the time when Mr. Challenger paddled?

A. No.

Q. Can you remember a specific time that you were paddled that Mr. Kay was not there?

A. I know I was paddled one time when he wasn't there.

Q. You remember that specifically?

A. Yeah.

Q. Do you remember why you were paddled [276] that time?

A. Messin' around.

Q. Do you remember how many licks you got at that time?

A. One.

Q. Did Mr. Challenger ever give more than one lick?

A. Not to me. I don't see him give nobody else more than one, either.

Q. Did it hurt?

A. Nope.

Q. Do you know whether, before Mr. Challenger paddled you, he went out of the room?

A. No, he didn't go out.

Q. Do you remember if Mr. Wright, the principal came into the room before you were paddled?



- A. In Challenger's room?  
 Q. Yes.  
 A. No, he ain't come in.  
 Q. Were there any other students in the room when you were paddled by Mr. Challenger?  
 A. Yeah.  
 Q. Who?  
 A. The whole class.  
 [277] Q. Were they able to see the paddling?  
 A. Yeah.  
 Q. You were able to see the other people paddled; is that right?  
 A. Yeah.  
 Q. You mentioned that Mr. Wright, the PE teacher, and Mr. Kemp, the PE teacher, paddled you.  
 Where did they paddle you?  
 A. In the gym.  
 Q. Do you remember how many times they paddled you?  
 A. Three.  
 Q. How many times did Mr. Wright paddle you; the PE teacher?  
 A. How many licks he give me?  
 Q. On how many occasions.  
 A. Mr. Wright paddled me three—no, two times.  
 Q. Mr. Kemp?  
 A. Three.  
 Q. Mr. Kemp paddled you three and Mr. Wright paddled you two?  
 A. Yeah.  
 Q. That was all in the Drew school; is [278] that right?  
 A. Yeah.  
 Q. Do you remember any of those paddlings particularly?  
 Do you have any recollection of those paddlings by Mr. Wright, let's say?  
 A. What you mean?  
 Q. How would he paddle you?  
 A. Touch the desk. Sometimes just stand up straight.  
 Q. Did you ever see him paddle anybody else?  
 A. Yeah.  
 Q. Who?  
 A. More children.

- Q. What?  
 A. Some more students.  
 Q. Was he paddling them for the same reason he was paddling you?  
 A. Sometimes.  
 Q. What reason would that be?  
 A. Not dressing out.  
 Q. What do you mean?  
 A. Not putting on the proper uniform for PE.  
 [279] Q. What was the proper uniform for PE?  
 A. White T-shirt, white socks, tennis shoes and brown shorts.  
 Q. You say you were paddled for that reason?  
 A. Yeah.  
 Q. Did Mr. Kemp paddle you also for that reason?  
 A. Yeah, he's the one that paddled me for that.  
 Q. How many times were you paddled for failing to dress out; do you recall?  
 A. About four times.  
 Q. Do you recall what article of clothing you didn't have during each of those times?  
 A. Sometimes I might have my—one time I didn't have no white socks.  
 Q. Why not?  
 A. Because somebody stole them.  
 Q. Did you explain that to Mr. Kemp?  
 A. They ain't want to hear all of that.  
 Q. How do you know they didn't want to hear that?  
 A. He said he don't want to hear it.  
 [280] Q. Did you try to explain that to him?  
 A. Yeah.  
 Q. What other reasons did they paddle you for?  
 A. If I be playing around the class, running, going out before time, come in late, eating in the class.  
 Q. I want to get back to the dressing out. Were you ever paddled for not having any other article of clothing? You mentioned a few articles of clothing that you had to wear.  
 A. Yeah.  
 Q. One time for not having white socks. What was another time?  
 A. I had no tennis shoes then.  
 Q. Why didn't you have any tennis shoes?

A. Somebody stole them.

Q. Why didn't you buy new tennis shoes?

A. Because I didn't have no money.

Q. Who paddled you then; Mr. Wright or Mr. Kemp?

A. Mr. Kemp.

Q. Did you explain it to Mr. Kemp?

A. Tried.

[281] Q. What did he say?

A. He said, "That ain't no excuse."

Q. Did you tell him that you didn't have any money to buy new shoes?

A. I ain't tell him I ain't got no money. I tell him I couldn't get none right now.

Q. Do you live in a public housing project now?

A. Yeah.

Q. Does your mother work?

A. Nope, not that I know of.

Q. Does your father work?

A. Yeah.

Q. What does he do?

A. Finishing concrete, I think.

Q. Is that what he did at that time?

A. When I was——

Q. In the eighth grade.

A. When I was going to the eighth grade?

Q. Yes.

A. Yeah.

Q. How many brothers and sisters did you live with at that time?

A. All of them. Seven. I make eight.

[282] Q. You are the eighth?

A. Yeah.

Q. Are you the oldest or the youngest or in the middle or what?

A. I'm the oldest.

Q. So they are all younger than you; is that right?

A. Yeah.

Q. Your parents both live at home?

A. Yeah.

Q. Do you remember how many times you were paddled and how many licks you received for not dressing out?

A. Three. Sometime two.

Q. Were you ever paddled for any other reason, in PE, that you can remember specifically?

A. Being late.

Q. Anything else?

A. Nope.

Q. Do you know if you have ever had a psychological examination by a doctor, a psychologist?

A. You mean taking tests?

Q. Yes.

A. Nope.

[283] Q. You don't know?

A. [No reply.]

Q. Do you remember when Mr. Deliford paddled you?

A. Yeah.

Q. Do you see him in the courtroom today?

A. Yeah.

Q. Can you point to him?

A. In the corner. Right over in this corner.

Mr. FEINBERG. Let the record reflect the witness has identified Mr. Deliford.

By Mr. FEINBERG:

Q. Do you know Mr. Deliford?

A. Yeah.

Q. Can you get up and point to him. Get close to him and point to him, please. Get up and walk down and point to him.

A. Oh, man!

The COURT. What color coat does he have on, young fellow?

The WITNESS. Gold.

By Mr. FEINBERG:

Q. What color shirt does he have on?

[284] A. Yellow.

The COURT. You are talking about the man with his back to that steel cabinet?

The WITNESS. Yeah.

Mr. FEINBERG. Now let the record reflect the witness has identified Mr. Deliford.

By Mr. FEINBERG:

Q. Do you recall when Mr. Deliford paddled you?

A. What dates?



Q. No. Do you recall that he paddled you?  
 A. Yeah.  
 Q. Do you recall the incident? Do you recall the paddling?  
 A. Yeah.  
 Q. Where did it take place?  
 A. In his office.  
 Q. Do you recall the reasons for the paddling?  
 A. No.  
 Q. Do you recall who else was in the office?  
 A. Nobody but him.

[285] Q. Was any other student in the office? Were any other students in the office?

A. Not in his office then. I was the only one in there then.

Q. Just you and him?

A. Yeah.

Q. How many licks did he give you; do you remember?

A. Five.

Q. Is that the only time Mr. Deliford paddled you?

A. Nope.

Q. Do you remember the next time he paddled you?

A. In the band room.

Q. What were you doing in the band room?

A. That's the class I go.

Q. Were there any other teachers or adults in the band room at the time you were paddled?

A. Yeah.

Q. Who was that?

A. The band teacher.

Q. Were there any other students in the classroom?

[286] A. The rest of the students.

Q. Do you remember why Mr. Deliford paddled you, at that time?

A. I walked out in the hall with no hall pass.

Mr. HOWARD. I didn't hear that.

The WITNESS. I didn't have a hall pass.

By Mr. FEINBERG:

Q. You said you were in the band room; is that right? How did you get into the band room from the hall?

A. He took me in there.

Q. That was the class you were to attend at that time; is that right?

A. Yeah.

Q. Where did Mr. Deliford get his paddle, at that time?

A. Out of his office?

Q. He went back to his office to get his paddle?

A. Yeah.

Q. Do you remember how many licks you got that time?

[287] A. Three.

Q. Do you remember if Mr. Deliford ever paddled you any other time?

A. Nope.

Q. You don't remember or he didn't do it?

A. I don't remember.

Q. Do you remember when Mr. Barnes paddled you?

A. Yeah.

Q. Where was that in the school?

A. In Mr. Deliford's office one time and upstairs in the bathroom one time.

Q. Let's talk about Mr. Deliford's office.

What did he paddle you for then?

A. I think for acting up in the class. I don't know what class.

Q. Did he see you acting up in the class?

A. Nope.

Q. How did you get to his office?

A. They took me there.

Q. Who is "they"?

A. Mr. Barnes.

Q. How did Mr. Barnes know to get you?

A. He was walking in the hall.

[288] Q. Where did he get the paddle from?

A. I don't know. He had it when I seen him.

Q. He had it while he was walking in the hall?

A. Yeah.

Q. Did you ever see him with a paddle, at other times while he was walking in the hall?

A. Yeah.

Q. Did he ever walk in the loft upstairs?

A. Yeah.

Q. Did you ever see him with a paddle then?

A. Yeah.

Q. Where did he carry the paddle?

A. The way he carried it?

Q. How did he carry it?

A. In his hand. Sometime he carried it under his arm.

Q. Did you ever see him use it in the loft area?

A. In the bathroom. Not in the open.

Q. You mean when he paddled you?

A. Yeah.

[289] Q. Did you ever see him paddle anybody else in the bathroom?

A. Yeah.

Q. Was that a different time than he paddled you or at the same time?

A. The same time.

Q. Did you ever see him paddle anybody else in the bathroom, at a different time?

A. No.

Q. Did you ever see him paddle anybody in the classroom or in the loft?

A. Nope.

Q. This is Mr. Barnes; is that right?

A. Yeah.

Q. Other than the time that Mr. Barnes paddled you in the bathroom, did he ever paddle you?

A. What's that?

Q. Did he ever paddle you any other times other than in the bathroom? Mr. Barnes, that is.

A. Yeah; in Mr. Deliford's office.

Q. Other than that time?

A. Not that I remember.

Q. Excuse me?

A. Not that I remember.

[290] Q. Tell me about the bathroom paddling at that time.

A. I was doing nothing. I was almost late for PE.

Q. Where were you when you were stopped?

A. Upstairs in the loft.

Q. Isn't Mr. Deliford's office upstairs?

A. No.

Q. Is Mr. Wright's office upstairs?

A. No.

Q. Whose office is upstairs? Is Mr. Barnes' office upstairs?

A. No. I don't know.

Q. Who stopped you?

A. Mr. Dean.

Q. Mr. Dean?

A. Yeah, I think that's his name.

Q. What did he say to you; do you remember?

A. He said I was late.

Q. What did you say?

A. "I got two more minutes, and I can make it."

Q. What did he do?

[291] A. He said I couldn't make it, so he took me to Mr. Barnes.

Q. Where was Mr. Barnes at the time?

A. He was walking to the bathroom at the time.

Q. Did he have a paddle with him?

A. Yeah.

Q. Did you see it?

A. Yeah.

Q. You are sure of that?

A. Yeah.

Q. You got to the bathroom; is that right?

A. Yeah.

Q. Then what happened?

A. When I got there there was lots of children, lots of boys.

Q. How many boys were there?

A. Maybe fourteen, fifteen.

Q. You say "there." Where do you mean by "there"?

A. In the bathroom, inside.

Q. What were they doing in there?

A. Standing up when I got in there.

Q. Where was Mr. Barnes?

A. Standing at the door.

[292] Q. Then what happened?

A. He come inside.

Q. Who is "he"?

A. Mr. Barnes.

Q. He came inside where?

A. The bathroom.

Q. Where were you at the time?

A. In the bathroom.

Q. Who told you to go in the bathroom?

A. Mr. Barnes.



- Q. Then what happened?
- A. He start beating them boys at first.
- Q. Did he say anything to them before he beat them?
- A. "Get over here," and that's all.
- Q. How did he make them stand when he beat them?
- A. I got to show that too?
- Q. Sure. Show me how he made them stand when he beat them. Stand up and show me.
- A. Well, you know how it is.
- Q. Stand up, Roosevelt.
- A. Well, you know how the squares are in the bathroom, the lines on the floor, he tell me to get [293] to a certain line and then bend over to the urinate thing.
- Q. On the what?
- A. He tell you to stand like the third line and like this is the bath urinate.
- Q. That is what?
- A. Urinate place.
- Q. Then what did he say?
- A. He says—like the line here going across, so he tell you stand up and touch the urinal thing.
- Q. Did you touch the urinal? Is that what he said, "Bend over and touch the urinal"?
- A. Yeah.
- Q. He said that to the other boys; is that right?
- A. Yeah.
- Q. Is that before he paddled you or after he paddled you?
- A. Before.
- Q. What did he do when they stood over and leaned against the urinal?
- A. Beat them.
- Q. With what?
- [294] A. A board.
- Q. Do you remember how many licks he gave?
- A. All different kinds of licks. I mean all different kinds in numbers.
- Q. Did they say anything?
- A. Yeah, they say something.
- Q. What did they say?
- A. All kinds of stuff. They say—some of them hollering, cry, prayed, and everything else.
- Q. Did the licks hurt them?

- A. I guess so.
- Q. When did he paddle you; before, while he was paddling the fifteen boys, or after, or what?
- A. After he paddle all of them, sending them out and then he paddled me.
- Q. What did he tell you to do?
- A. Same thing; stand behind the line and touch the urinate thing.
- Q. Then did he paddle you?
- A. No.
- Q. Why not?
- A. Because I ain't stand up there.
- Q. Why is that?
- A. I told him I could have made it if he [295] would have left me went.
- Q. You mean made it to the class? Is that what you mean?
- A. Yeah.
- Q. Then what happened?
- A. Then he said something, I don't know what it was, and then he said, "Bend over," and I ain't want to bend over, so he pushed me against the urinate thing, the bowl, and then he snatched me around to it and that's when he hit me first.
- He first hit me on the backsides and then I stand up and he pushed me against the bathroom wall, them things—that part the bathroom, the wall.
- Q. The partition?
- A. Between the toilets, he pushed me against that and then he snatched me from the back there and that's when he hit me on my leg, then hit me on my arm, my back and then right across my neck, in the back here.
- Q. Did those blows hurt?
- A. Yeah, all of them hurt.
- Q. Do you know if you had any marks from those blows?
- A. No.
- [296] Q. You don't know whether you did?
- A. No.
- Q. Then what happened?
- A. After he got through I just said, "You're not suppose to beat nobody like that," and I said, "I'm going down to talk to Mr. Wright."
- Q. The PE teacher or the principal?

A. The principal.

Q. Then what happened?

A. Then he said, "Let's do that." So he got me by my shirt and started to push me downstairs and I got downstairs and they weren't going to listen to what I had to say.

Q. I didn't hear you.

A. They wouldn't listen to what I had to say.

Q. Who were "they"?

A. Mr. Wright.

Q. Was anybody else in the office when you got down to Mr. Wright's?

A. Deliford.

Q. You say neither of them would listen to what you had to say?

A. No.

[297] Q. So what happened?

A. Asked me what I was doing late and I told them I could have made it if they let me go and wouldn't have stopped me.

Q. Then what happened?

A. Then they told me to get out in front and sit down and wait.

Q. Then what happened?

A. Then I went home, after school was out.

Q. Mr. Wright didn't paddle you at that time, did he?

A. No.

Q. Did you wait and go home when school was let out?

A. Yeah.

Q. Is that what you did?

A. Yeah.

Q. When you got home, did you tell your parents about it?

A. Yeah.

Q. Who did you tell?

A. Both of them, mommy and daddy.

Q. Did they do anything about it?

[298] A. My daddy come down to the school.

Q. Were you with him?

A. Yeah.

Q. Who did you see?

A. Mr. Deliford and Mr. Barnes. I don't know if Mr. Wright was there at the time—yeah, he were there.

Q. Do you remember what your father said?

A. Not all.

Q. Do you remember part?

A. First he went down there and he asked to talk to Mr. Barnes.

Q. First he talked to Mr. Barnes.

Did he go down to the school more than once?

A. Yeah.

Q. Let's talk about the first time.

When you first got to school, who did he see?

A. Mr. Barnes and Mr. Deliford, in Mr. Deliford's office.

Q. What did your father tell them?

A. He want to talk to them, and then we went to Mr. Wright's office and he talked to all three [299] of them.

Q. What did your father say?

A. At first he asked why he wants to beat—he say, "Why do you want to beat my son," and—

Q. Was it just you and your father who went to school at that time?

A. Yeah.

Q. What did they say?

A. I don't remember what they said.

Q. Did they say they were not going to beat you any more?

A. No, they don't say that.

Q. Did they say they would beat you any more?

A. They ain't exactly say that neither.

Q. Was your father satisfied after talking to them?

A. Not right then, no. He got madder.

Q. Was he angry?

A. Yeah.

Q. Were you paddled any other times, by Mr. Barnes, after that?

A. No.

Q. Who were you paddled by after that?

[300] A. Mr. Wright.

Q. Mr. Wright the principal?

A. Yeah.

Q. Where did that paddling take place?

A. In his office.

Q. In Mr. Wright's office?

A. Yeah.

Q. Was anybody else present?



A. Mr. Deliford and Mr. Barnes.

Q. Did you take that paddling?

A. Not exactly take it.

Q. Did you resist it?

A. Yeah.

Q. How many times did he paddle you?

A. That time?

Q. Yes.

A. How many licks did I get?

Q. Do you remember?

A. No.

Q. Did it hurt?

A. Yeah.

Q. Where did he hit you?

A. On my backsides and on my arm, my wrist.

[301] Q. On your wrist?

A. Yeah.

Q. What happened next?

A. After I got the beating?

Q. Yes.

Before I ask you that; do you remember why they paddled you at that time?

A. I remember why he say he paddled me.

Q. What did he say?

A. A boy broke some glasses in sheet metal and they say I did it, but he told me he had broke them and the boy say he was going to pay for them, he didn't mean to break them. It wasn't my fault.

Q. Did they paddle the other boy?

A. No.

Q. They paddled you, though?

A. Yeah.

Q. You say they hit you on the backsides and on your wrist. Did they hit you any place else?

A. Nope.

Q. Then what happened?

A. I went home. Not right then, though.

Q. At the end of the day?

A. Yeah.

[302] Q. Did you tell your parents about it that time?

A. Yeah.

Q. Did your father do anything about it?

A. He come down there; me, him and another man name Mr. Donn [phonetic].

Q. Who was Mr. Donn?

A. Just a friend.

Q. A friend of your father?

A. A friend of everybody's.

Q. Do you remember who your father and Mr. Donn and you saw, at that time?

A. Mr. Wright and Mr. Barnes and Mr. Deliford.

Q. Did the paddling hurt that time?

A. When Mr. Wright beat me?

Q. Yes.

A. Yeah.

Q. Where did it hurt you?

A. Mostly on my wrist.

Q. What was wrong with your wrist? Could you see any visible signs of the paddling?

A. On my wrist, yeah.

Q. What did it look like?

[303] A. Like a mark.

Q. Was it swollen?

A. Yeah.

Q. You say you went to school with Mr. Donn and your father?

A. Yeah.

Q. What is your father's name?

A. Willie Everett.

Q. You got to school with Mr. Donn and your father, and who did you see?

A. Mr. Deliford and Mr. Barnes and Mr. Wright.

Q. Where?

A. In the office?

Q. Whose office; do you remember?

A. Mr. Wright's.

Q. Do you remember what your father said at that time?

A. No.

Q. Do you remember if your father was angry?

A. Yeah, he was angry.

Q. Boiling mad?

A. Somewhere close to that.

[304] Q. Do you remember what they said to him? Do you remember if they told him they wouldn't paddle you any more?

A. Yeah, they said—he said, “If you don’t want your child paddled, don’t send him to school then,” or something like that. Mr. Wright said that.

Q. “Don’t send him to Drew”, you mean?

A. Yeah; “take him out of school.”

Q. Then what happened?

A. I forget what they were talking about. Mr. Wright told my daddy I had attacked the teacher.

Q. Is that the reason he said he paddled you?

A. No, that ain’t the reason. He just say I did, just brought that up.

Q. They just brought that up?

A. Yeah.

Q. Did you attack a teacher?

A. Nope.

Q. Did they bring the teacher in?

A. No. As we were going out the door to go, I seen the teacher, so I had called him and get it straight with my daddy.

Q. You mean your father was with you [305] at the time?

A. Yeah.

Q. You wanted your father to talk to the teacher?

A. Yeah.

Q. What happened?

A. Well, he was going in the library, so I went in and called him. He come back out—he was coming back out of the library with me.

Q. The teacher?

A. Yeah. I said, “Mr. Wright say I had attack you,” like that.

He said, “Me?”

I said, “Yeah.” He said, “I don’t know nothing about that.”

So he come back out the door. He was going to tell my daddy that. As he was coming out the door my daddy was coming and he was walking over there to him and Mr. Wright told him to go back in the library, or go wherever he was going.

Q. Mr. Wright directed the teacher not to talk to your father; is that right?

A. Yeah.

Q. Did you ever get any treatment for [306] any injuries that you received as a result of that paddling? Medical treatment, I mean.

A. Yeah, I went to the hospital.

Q. When did you go to the hospital?

A. The same day I got hit.

Q. Did you see a doctor there?

A. Yeah.

Q. Did he give you any medication for your arm or your backsides?

A. No; he told me to put something cold on it and some kind of pain pills, whatever they call it.

Q. They gave you pain pills?

A. Some kind.

Q. Did you take them?

A. Yeah.

Q. How long did it take before the pain stopped; do you remember?

A. Sometime it stopped and it started right back up again.

Q. How long did it take before it stopped completely? It doesn’t hurt you now, does it?

A. No.

Q. How long did it take before it stopped [307] completely?

A. About a week. Seven or eight days.

Q. Were you able to play during that period of time?

A. Yeah, but not right.

Q. Were you able to use the arm? That’s what I am asking you.

A. No, not at that time.

Q. Were you paddled any other times after that that you can recall?

A. Nope.

Q. Do you remember whether or not your father told them not to paddle you?

A. No; he said, “If you are going to paddle him, paddle him right and not like an animal,” or something like that.

Q. Why did he say that? Which time did he say that; the first time or the second time?

A. Both times.

Q. Why did he say that the second time? Because of your arm?



A. Yeah.

Q. Do you remember what Mr. Wright or Mr. Deliford or Mr. Barnes said, in response to that?

[308] A. Nope.

Q. Where are you working now, Roosevelt?

A. Nowhere right now.

Q. You are not working at a gas station?

A. No; I stopped, two days. I ain't stopped; he move to another place.

Q. Did you go to the tenth grade?

A. Yeah.

Q. Did you go to the eleventh grade?

A. Nope.

Q. Why not?

A. Well, I want to go to—I come from court when—

Q. You mean this court?

A. No; another court.

Q. Is that for something you did in school?

A. No.

Q. Is it true that you were expelled from school?

A. Yeah.

Q. Do you remember what that was for?

A. Having a knife.

Q. What grade were you in when you were [309] expelled?

A. Tenth.

Q. Were you ever suspended from school?

A. Yeah.

Q. I mean for short periods of time as opposed to being expelled permanently.

A. Yeah.

Q. You were?

A. Yeah.

Q. Can you remember how many times?

A. From that school?

Q. Any place.

A. About four times.

Q. Do you remember if you took any special education classes to teach you how to read?

A. Yeah.

Q. When was that?

A. Sixth grade and Charles Drew, too.

Q. You don't remember whether you saw a psychologist or not?

A. I don't know who is what I seen. They ain't gave me no test.

Q. You saw someone but you don't know who it was?

[310] A. Yeah.

Mr. FEINBERG. No further questions.

[Short recess.]

#### CROSS-EXAMINATION

By Mr. HOWARD:

Q. Roosevelt, I am just going to ask you a few questions and then you will be through.

You were telling Mr. Feinberg a while back about getting paddled on the hand and on the behind during elementary school and North Dade and at several of these other schools.

Do you remember telling him about that?

A. Yeah.

Q. Most of the time you would just get one lick on the hand or on the bottom?

A. Most times.

Q. When you got these, would it help you behave when you were acting up in class?

A. No. Sometime.

Q. I can't hear you.

A. When I went to elementary school it did.

Q. You wouldn't go on misbehaving after [311] the teacher would whack you with a ruler, would you?

A. Nope; elementary—

The COURT. Speak up so we can hear you. I can't hear you.

By Mr. HOWARD:

Q. You have to speak up a bit louder.

A. In elementary?

Q. Yes.

A. [No reply.]

Q. You said you were suspended about four times all together?

A. Yes.

Q. Did you have some suspensions before you got to Drew Junior High?

A. Yeah.

Q. You did?

A. Yeah.

Q. How many? Do you remember?

A. No.

Q. How many days were they for each time; do you remember?

A. Five and three.

Q. What were those suspensions for?

A. One was for fighting. I don't know [312] what the other one was for.

Q. Were you called down to talk to the principal or assistant principal or a guidance counsellor, from time to time, about your conduct in school?

A. Yeah. Just like coming to class and talking.

Q. Did you talk with your teacher or with somebody who was a guidance counsellor every once in a while, because of acting up in class?

A. Nope.

Q. You said you didn't remember having psychological tests?

A. No.

Q. Do you remember a teacher or counsellor named Calderman or Salderman? Did you have a teacher or counsellor by that name?

A. Salderman? No, I don't remember that name.

Q. It could be Keller; did you have a teacher named Keller?

A. No.

Q. I'm not talking about Drew; I'm talking about back before you went to Drew. Do you [313] remember talking to somebody named Keller?

A. Nope.

Q. Do you remember talking to Mr. Miller? Do you remember Mr. Miller, at North Dade?

A. Yeah, I remember him.

Q. Do you remember talking to him about your program in school and about your conduct?

A. He ain't call me, just like that, to the office.

Q. What?

A. Like when I went to the office and got a whipping, then after I got the whipping then he talked to me.

Q. Did he talk to you in his office?

A. No. Standing up right there, like going out the door.

Q. Do you remember a counsellor named Mr. Jones, at Drew?

A. Nope.

Q. You don't remember talking with him about your conduct in school and how to get along with other people?

A. I talked to a lady.

Q. To a lady?

[314] A. That's her name, Miss Jones.

Q. I don't know Miss Jones, but you did talk to a lady in Drew about your behavior and how to act in school?

A. She talking about don't get in trouble, maybe like when I was arguing with somebody, she say, "Just forget about it and walk away."

Q. Where was this? Was that in her office?

A. In the hall.

Q. Did you talk to the lady more than one time about how you were behaving and how you ought to act?

A. I don't know.

Q. Roosevelt, you were kind of getting in trouble more or less lots of times, weren't you, while you were in school?

Mr. FEINBERG. Your Honor, I object to that question. I think the record speaks for itself. It's already in the file.

The COURT. He is not asking what the record says. He wants to know if he is in lots of trouble.

Mr. FEINBERG. I think the question is [315] too general. If he wants to ask him a specific time, fine.

The COURT. Overruled.

By Mr. HOWARD:

Q. Roosevelt, didn't you get—

Mr. FEINBERG. In that case, Your Honor, I will stipulate he did get in trouble very often at school.

Mr. HOWARD. I would like to be able to examine the witness on it. I am not asking for a stipulation.

The COURT. You may go ahead.

By Mr. HOWARD:

Q. When you would get in trouble in school, in elementary and junior high and so on, wouldn't the teacher ordinarily talk to you about it, or the principal would talk to you about it, and try to find out what was the matter; try to help you so you would not get in trouble again.

A. Most when I get a whipping they just—



Q. What?

A. Mostly they call me—like I be in elementary, call you up, give you a licking and sit down and don't do it no more.

[316] Q. Lots of your teachers—

Mr. FEINBERG. Your Honor, I object. I think the witness was testifying and he was interrupted. I think he has a right to explain his answer.

The COURT. Do you have something else you want to say to that question?

The WITNESS. Yeah.

The COURT. Go ahead.

The WITNESS. In junior high, when I get a whipping they first ask the teacher whatever they see you do, like that, what happened, and then after they asked what happened—sometimes, though, during North Dade they did, they listened to you, they say you were wrong, you say you wasn't wrong.

They say, "Well, guess the teacher is lying," or something like that.

By Mr. HOWARD:

Q. In North Dade sometimes you would explain and then you wouldn't get punished? Is that what you are trying to tell me?

A. Yeah.

Q. Lots of your teachers talked to you from time to time, didn't they, about your behavior and about how to get along in school and how to get [317] along with the other students and the teacher?

A. They talk to me, like walking in the hall, like when I first get—like seeing the principal like seeing you at lunch, and sitting with you, they will start talking with you, but they ain't never call me down just to talk about nothing.

Q. I want to talk about the paddlings that you received in Drew, Roosevelt, and let me see if we can get straightened out on them.

The first time you were paddled at Drew, it was Mr. Deliford that paddled you; is that right?

A. Yeah.

Q. Wasn't that because of some commotion in the band room? Wasn't that what led to Mr. Deliford giving you some licks that day?

A. Some commotion, no. That was because I had been in the hallway with no pass.

Q. That was when Mr. Dean took you to see Mr. Barnes, wasn't it?

Mr. FEINBERG. Your Honor, Mr. Howard is arguing with the witness; I believe he is utilizing referral slips from the school in which the depositions are incomplete and not accurate.

[318] The COURT. He just asked him a question.

Mr. FEINBERG. He is arguing with the witness.

Mr. HOWARD. I am testing his memory.

Mr. FEINBERG. The man said, "No."

The COURT. That is perfectly proper cross-examination. He simply is attempting to refresh his recollection. If the young fellow doesn't agree, all he has to do is say no, just as he did then.

You can proceed, Mr. Howard.

By Mr. HOWARD:

Q. Roosevelt, the first time that you had a paddling from Mr. Deliford, wasn't that when you were in Mr. Cuff's class, the band class, and you had been talking and cutting up in class and then running out and almost knocking him down?

Do you remember that?

A. No, I don't remember that.

Q. You don't remember that at all?

A. No.

Q. You said Mr. Deliford paddled you because of what, now?

[319] A. I was in the hall with no hall pass.

Q. Are you sure that wasn't the time that Mr. Dean took you in to see Mr. Barnes?

A. That was a different time.

Q. You are telling me you don't remember this business in the band room, fighting and cutting up and calling out, and being taken by Mr. Deliford then to his office and getting some licks on account of that?

Do you remember that?

A. I remember getting in the bathroom for being in the hall. I don't remember getting the whipping in the band room.

Q. At the time Mr. Dean found you in the hall and took you in to see Mr. Barnes in the rest room; do you remember that?

A. Yeah.

Q. Mr. Barnes gave you only two licks, didn't he, in the rest room?

A. No, he didn't give me no two licks.

Q. What?

A. You mean with the board?

Q. I didn't hear you.

A. You mean with the board?

[320] Q. Yes.

A. No, he didn't give me no two licks.

Q. How many do you say he gave you?

A. I don't know.

Q. You don't know?

A. He just start hitting.

Q. Did you say that there were fourteen or so other boys in there, and Mr. Barnes was giving licks to them, too, in the bathroom?

A. Yeah, he was beating them.

Q. He was what?

A. Yeah.

Q. Are you sure about that?

A. When I come in there.

Q. Wasn't he showing them out to class because the bell was about to ring, or already had rung?

A. When Mr. Dean had stopped me and was bringing me to the bathroom, I ain't know where he was taking me first, but he was walking toward the bathroom and Mr. Barnes was walking across the loft area to the bathroom with some more boys.

He told them to go inside, and Mr. Dean took me and told him I was late and I had told [321] him I could have made it if they wouldn't have stopped me because I had two more minutes and they said I couldn't make it.

Then he took me in the bathroom and told me to stand against the wall and wait.

The COURT. What he is asking is whether or not he was paddling boys other than you, in there.

Is that what your question was, Mr. Howard?

Mr. HOWARD. Yes, sir.

The WITNESS. Yes, he was paddling more boys. He paddled them first.

By Mr. HOWARD:

Q. Let's talk about the time that Mr. Wright paddled you. That was in his office, wasn't it?

A. Yeah.

Q. What did you say that paddling was for?

A. Involved breaking.

Q. Wasn't it a fact that he paddled you that day because you had hit Henry Streeter with a board?

[322a] A. No; Henry Streeter was no way in that.

Q. Do you remember hitting Henry Streeter with a board and you two got into a fight?

A. No, we ain't never fought, not that I know of.

Q. You say that never happened?

A. I never fought with no Henry Streeter.

Q. Think again, Roosevelt; when this happened with the goggles and you were taken down to Mr. Wright's office, he didn't give you any licks at all for that, did he?

A. Yeah, because he sent James back to class. That was the same day he sent James back to that class.

Q. You say your father is Willie Everett. He's your step-father, isn't he, Roosevelt?

A. He's my father.

Q. When he punishes you, what does he use; a belt or what?

Mr. FEINBERG. I object to the question on the same grounds I objected before.

The COURT. Sustained.

Mr. HOWARD. Your Honor, I respectfully submit we are supposed to be talking about cruel [322b] and unusual punishment. This is the theory of this case.

I have no further questions, Your Honor.

[Witness excused.]



(73-2078)

OCTOBER 3, 1972.

Re Policy and Regulation 5144, Corporal Punishment.

Mr. HOWARD:

## POLICY

Third revision 8/5/70—2 pages.

Fourth revision 12/9/70—2 pages.

Fifth revision 11/3/71—1 page (currently in book).

## REGULATION

Original adoption 11/3/71—2 pages (currently in book).

Re Policy and Regulation 5150, Control of Student Behavior.

## POLICY

Original adoption 6/17/70 (currently in book).

## REGULATION

Original adoption 8/5/70—3 pages.

First revision 12/9/70—3 pages (currently in book).

## ELEMENTARY AND SECONDARY

## Discipline/Punishment: Corporal Punishment

## I. DISCIPLINE

Successful learning is contingent upon the self-discipline of the student as well as upon the group discipline which supports the learning climate.

Student infractions of rules and departures from good behavior should be studied, and corrective action should be taken as a result of identification of reasons for improper behavior before punishment is invoked. The only exception to this

(122)

logical process is in the case of erratic behavior of a student which may affect the safety of himself or others. At this point, it is necessary to act immediately and probe for causal reasons as soon as possible. A study of individual differences, conferences with the pupil and parent, and assistance from the principal, pupil personnel and other school resource specialists may aid the teacher in attempting to help a student correct behavior patterns which are retarding his development or interfering with the rights of others. The principal may also suggest seeking assistance from other resources in the school district offices or in the community.

A teacher or principal stands substantially in loco parentis with the child; that, coupled with the authority set forth in *Florida Statutes*, vests them with the power to establish rules for discipline, develop understandings for the enforcement of obedience, and, as a concomitant, power to enforce the classroom regulations.

## II. PUNISHMENT: CORPORAL PUNISHMENT

Punishment in the general sense is the inflicting of a penalty for an offense. Corporal punishment is generally applied to the body of the offender or is physical punishment as opposed to other forms of punishment and is administered as a means of changing the behavior of the student. Therefore, it is important to analyze whether or not this goal will be accomplished by such action.

Corporal punishment may be used in the case where other means of seeking cooperation from the student have failed. If it appears that corporal punishment is likely to become necessary, the teacher must confer with the principal. The principal will determine the necessity for corporal punishment and designate the time, place, and the person to administer said punishment. In any case, the student should understand clearly the seriousness of the offense and the reason for the punishment. Care should be taken that the period of time between the offense and the punishment is not so long as to cause undue anxiety in the pupil. The punishment must be administered in kindness and in the presence of another adult, at a time and under conditions not calculated to hold the student up to ridicule or shame.

In the administering of corporal punishment, no instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck. The person administering the corporal punishment must realize his own personal liabilities if the student being given corporal punishment is physically injured.

Corporal punishment should never be administered to a student whom school personnel know to be under psychological or medical treatment unless there has been a pre-conference with the school psychologist or the physician.

(See also Regulation 5150, Control of Student Behavior.)

Legal Reference: *Florida Statutes*, 231.09 (3), 232.25, 232.26 and 232.27.

#### ELEMENTARY AND SECONDARY

#### Discipline/Punishment: Corporal Punishment

##### I. DISCIPLINE

Successful learning is contingent upon the self-discipline of the student as well as upon the group discipline which supports the learning climate. Teachers and administrators have the authority and the responsibility to establish and maintain sound and effective discipline in the school.

Student infractions of rules and departures from good behavior should be studied, and corrective action should be taken as a result of identification of reasons for improper behavior before punishment is invoked. The only exception to this logical process is in the case of erratic behavior of a student which may affect the safety of himself or others. At this point, it is necessary to act immediately and probe for causal reasons as soon as possible. A study of individual differences, conferences with the pupil and parent, and assistance from the principal, pupil personnel and other school resource specialists may aid the teacher in attempting to help a student correct behavior patterns which are retarding his development or interfering with the rights of others. The principal may also suggest seeking assistance from other resources in the school district offices or in the community.

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for discipline, develop understandings for the enforcement of obedience, and, as a concomitant, power to enforce the classroom regulations. Teachers and administrators have the right to use such means, including the moderate use of physical force or physical contact, as may be necessary to maintain sound discipline and to enforce school order and rules, provided these means are not for the purposes of inflicting punishment. If physical force becomes necessary the means used will depend on the circumstances, including the nature of the misconduct of the student, the age of the student, and the physical and emotional condition of the student. Physical force must not be used maliciously or wantonly.

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Corporal punishment should never be administered to a student whom school personnel know to be under psychological or medical treatment unless there has been a pre-conference with the school psychologist or the physician.

(See also Regulation 5150, Control of Student Behavior.)

Legal Reference: Florida Statutes, 231.09(3), 232.25, 232.26, and 232.27.

#### ELEMENTARY AND SECONDARY

##### DISCIPLINE AND CORPORAL PUNISHMENT

Teachers and administrators have the authority and the responsibility to establish and maintain sound, effective discipline in the school. Successful learning is contingent upon the self-discipline of the student, as well as upon the group discipline which supports the learning climate.

The authority set forth in *Florida Statutes* vests teachers and administrators with the power to establish rules for discipline, develop understandings for the enforcement of obedience, and, as a corollary power, to enforce the classroom regulations. Teachers and administrators have the right to use such means, including the moderate use of physical force or physical contact, as may be necessary to maintain discipline and to enforce school order and rules. If physical force becomes necessary, the means used will depend upon the circumstances, including the nature of the misconduct of the student, the age of the student, and the physical and emotional condition of the student. Physical force must not be used maliciously or wantonly.

Punishment in the general sense is the inflicting of a penalty for an offense. Corporal punishment is generally applied to the body of the offender, or is physical punishment as opposed to other forms of punishment and is administered as a means of changing the behavior of the student. It is therefore important to analyze whether or not this goal will be accomplished by such action.

The Board directs that procedures for the administration of corporal punishment shall be developed by the superintendent to assist the principal in the implementation of this policy.

(See also Policy and Regulation 5150, Control of Student Behavior.)

Legal Reference: *Florida Statutes*, 231.09(3), 232.25, 232.26, 232.27.

#### ELEMENTARY AND SECONDARY

##### CORPORAL PUNISHMENT

This regulation is issued to assist district and school staff members in the implementation of the policy on discipline and corporal punishment.

Procedures for the administration of corporal punishment:

1. When corporal punishment becomes necessary, the teacher must consult each time with the principal, or his administrative designee, prior to its use. The principal may not authorize a teacher to administer corporal punishment at the teacher's discretion.

The principal, or his administrative designee, will in every case determine the necessity for corporal punishment, and in every case will designate the time, place, and the person to administer the punishment.

2. In every case of corporal punishment, the student is to be told of the seriousness of the offense and the reason for the punishment.

3. Care should be taken that the period of time between the offense, or the school's awareness of the offense, and the punishment itself is not excessive.

4. The punishment must be administered in the presence of another adult at a time and under conditions not calculated to hold the student up to ridicule or shame.

5. The punishment must be reasonable:

- a. Corporal punishment for young children in the primary and intermediate grades shall be limited to a maximum of five strokes.

- b. At the junior and senior high level no more than seven strokes are permitted.

- c. The type of punishment, the severity of punishment, and the number of strokes administered when paddling a student must be individually determined in every case.

6. In administering corporal punishment, an instrument calculated to eliminate possible physical injury should be utilized. The instrument must be of wood and be no more

**BEST COPY AVAILABLE**



James Ingraham

R<sub>x</sub> NO. 5418-ER-  
 CLINIC 10/6/70  
 DATE 10/6/70  
 REFILL 1

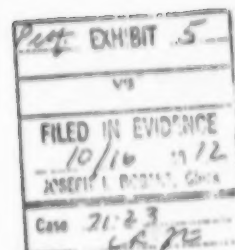
OUT PATIENT CLINIC

The above pt was seen here today - has a big glucose & urine + hepatitis + should be excused from school - P.E. until released (one week)

Or equivalent generic product

121.20-20 (2-550)

NARCOTIC REGISTRATION NO. \_\_\_\_\_

JACKSON MEMORIAL HOSPITAL  
EMERGENCY DEPARTMENT

DOCTOR CALLED AT \_\_\_\_\_

R<sub>x</sub> NO. \_\_\_\_\_  
 CLINIC \_\_\_\_\_  
 DATE 10-9-70  
 REFILL 1

OUT PATIENT CLINIC

James Ingraham  
 The patient cannot attend school for at least 3 days. Had been treated at J.M.H.

Or equivalent generic product

121.20-20 (2-550)

NARCOTIC REGISTRATION NO. \_\_\_\_\_



BEST COPY AVAILABLE

NAME James Tinsdale AGE 12  
ADDRESS 10-14-20 DATE 10-14-20

The above patient was seen at our  
Center & treated for leucotriaen in-  
fection & lam-bath. Still present  
but leucotriaen is pending run.  
Will not at home for next 72 hours

DO NOT RECALL  
PLEASE LABEL AS SUCH  
Generic Equiv. May E

DO NOT WRITE  
PLEASE LABEL AS SUCH  
Generic Equiv. May Be Used Unless Checked —

*Spencer*

REG. No. \_\_\_\_\_ M.D. \_\_\_\_\_



Signature: [Signature]  
Medical Director

T. 98<sup>12</sup> w/16.5 \$12.75  
copy/s bag also by dealer by pencil  
not signed by but looks like & dated  
at J. M. H. ..  
P.E. Fletcher ↓: So perfect  
reading they know better  
Trip: T. seen to be look  
Q. y. Contra was that  
⑤ 11 to C for.

Ingraham James  
106848-12-04148

THE FAMILY HEALTH CENTER, INC.  
MEDICAL PROGRESS RECORD

CLINICAL RECORD (ORIGINAL)

3-11-50



[Filed in evidence 10-16, 1972, Joseph I. Bogart, Clerk]

In the United States District Court in and for the Southern  
District of Florida

(Case No. 71-23-Civ-JE)

ELOISE INGRAHAM, ET AL., PLAINTIFFS

VS

WILLIE J. WRIGHT, ET AL., DEFENDANTS

*Stipulation*

The following Stipulation as to certain statistical facts is prepared pursuant to the Court's suggestion that an analysis, agreed to by the parties, of the information accumulated pursuant to Interrogatories answered by the Defendant SCHOOL BOARD, relating to the use of corporal punishment in the schools of Dade County would be more convenient and more meaningful than the introduction of the raw statistics.

This Stipulation is entered into with the understanding that the raw statistics upon which this analysis is based were supplied by individual school principals and not by the SCHOOL BOARD itself. Accordingly, the SCHOOL BOARD cannot vouch for the accuracy of the information other than to state that the information accumulated was produced pursuant to a request by the SCHOOL BOARD to each school in the Dade County School system.

By way of this Stipulation Defendants do not agree as to the materiality or admissibility of the statistics contained herein but only as to the statistical analysis of the raw information supplied to the SCHOOL BOARD by the various Principals of the Public Schools of Dade County. Assuming the information contained herein is admissible into evidence, Defendants do, by way of this Stipulation, waive any objection as to the possible hearsay character of the information contained in the



within Stipulation which objection might otherwise be sustained by the Court.

1. The total number of schools to which the SCHOOL BOARD Policy No. 5144 (discipline/punishment: Corporal punishment) is presently applicable and was applicable during the school year commencing September 1970 is approximately 231 (Two Hundred Thirty-One).

2. The total number of persons within the Dade County School System, other than school Principals, who administered corporal punishment but did not regularly and routinely confer with the Principal of the school in which they were employed during the school year commencing September 1970 was 59 (fifty-nine) prior to each paddling.

3. During the school year commencing September 1970 the total number of school personnel who administered paddlings in the Dade County School System other than Principals is 255 (Two Hundred Fifty-Five).

4. During the school year commencing September 1970 the total number of school personnel who conferred with their respective Principals before administering corporal punishment is 196 (One Hundred Ninety-Six).

5. During the school year commencing September 1970 the following schools in the Dade County School System did not administer corporal punishment as a matter of school policy:

- (1) Miami Agricultural Vocational High School
- (2) Miami Palmetto Senior High School
- (3) Hialeah Lakes Senior High School
- (4) Sunset Park Elementary School
- (5) North Beach Elementary School
- (6) North Miami Beach Senior High School
- (7) South Dade Senior High School
- (8) Norwood Elementary School
- (9) G. T. Baker Vocational High School
- (10) Miami Beach Senior High School

6. During the school year commencing September 1970 the following schools in the Dade County School System did not administer corporal punishment:

- (1) Miami Central High School
- (2) Rockway Elementary School
- (3) Bethune Elementary School

7. During the school year commencing September 1970 the following schools administered by the Dade County School System did not administer corporal punishment during the school year commencing September 1970, however, it has not been determined whether this was a policy decision on the part of the school or whether the failure to administer corporal punishment was due to the fact that behavioral problems did not arise which resulted in paddlings:

- (1) Cypress Elementary School
- (2) Miami Lakes Elementary School
- (3) Spring View Elementary School

8. The following schools in the Dade County School System during the school year commencing September 1970 administered corporal punishment in places other than the Principal's or Assistant Principal's office in the location indicated below:

- (1) Comstock Elementary School—Physical Education Room.
- (2) Junior High Opportunity Center—Boy's Bathroom.
- (3) Floral Heights Elementary School—Physical Education area.
- (4) Charles Drew Junior High School—Boy's Bathroom.
- (5) Natural Bridge Elementary School—Book Room.
- (6) Rainbow Park Elementary School—Clinic and in Visual Storage Room.
- (7) Pine Villa Elementary School—Several Classrooms.
- (8) Bunche Park Elementary School—Clinic
- (9) Everglades Elementary School—Clinic
- (10) Sunset Elementary School—Clinic

9. During the school year commencing September 1970 the following schools in the Dade County School System maintained at least one (1) paddle in the location indicated:

- (1) Charles R. Drew Elementary School—Room 21
- (2) G. W. Carver Junior High School—Shop—Physical Education Locker Rooms.
- (3) Miami Jackson Senior High School—Room 127.
- (4) Bunche Park Elementary School—Clinic.
- (5) Everglades Elementary School—Clinic.

10. During the school year commencing September 1970 43 (forty-three) schools administered by the Dade County

School Board did not maintain records respecting the administration of corporal punishment.

11. During the school year commencing September 1970 18 (eighteen) schools in the Dade County School System did not routinely and usually inspect cumulative records of those students who received corporal punishment.

ALFRED FEINBERG,

*Attorney for Plaintiffs, Legal Services of Greater Miami, Inc., 395 Northwest First Street, Suite 202, Miami, Florida 33128, Telephone—379-0822.*

FRANK HOWARD,

*Attorney for Defendants, Dade County Board of Public Instruction, 1410 N. E. Second Avenue, Miami, Florida.*

By THOMAS SPICER

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail upon Frank Howard, Attorney for Defendant, Dade County Board of Public Instruction, c/o Thomas Spicer, 1410 N. E. Second Avenue, Miami, Florida, and Leland Stansell, Esquire, 10th Floor, Biscayne Building, 19 West Flagler Street, Miami, Florida 33130 this 10th day of October, 1972.

ALFRED FEINBERG,  
*Attorney for Plaintiffs.*

73-2078

EXHIBIT #14

FILED IN EVIDENCE 10/18/72





United States District Court, Southern District of Florida

(Case Number 71-23-Civ-JE)

ELOISE INGRAHAM, ETC., ET AL., PLAINTIFFS

v.

WILLIE J. WRIGHT, ETC., ET AL., DEFENDANTS

*Order of Dismissal as to Count One and Count Two of  
Plaintiffs' Complaint*

THIS CAUSE was tried before the Court, without a jury upon Count Three of Plaintiffs' complaint. Count Three, a class action, seeks injunctive and declaratory relief to prohibit corporal punishment throughout the Dade County school system. At the close of the Plaintiffs' case the Defendants moved for dismissal. Counsel for the parties then agreed that the evidence offered by Plaintiffs to support Count Three would also be considered by the Court, as if upon motion for directed verdict, as having been offered on Counts One and Two, provided that certain additional testimony desired by Plaintiffs' counsel were placed in the record by deposition or stipulation.<sup>1</sup> The additional testimony has been summarized in a stipulation filed, which reflects that such testimony, taken together with all of the evidence introduced at trial upon the Third Count, constitutes all of the evidence which plaintiffs would offer before a jury in their case in chief to support the First and Second Counts.

Therefore, before the Court is what amounts to defendants' motion for directed verdict as to counts One and Two. The issue now before the Court is whether the evidence, viewed most favorably to plaintiffs is sufficient to permit a jury to

<sup>1</sup> It was also understood that such agreed procedure would not waive defendants' right to a jury trial if the motion were denied.

return a verdict for plaintiffs on either or both of the First and Second Counts.

Counts One and Two of the complaint are "civil rights" actions brought by two junior high school students, Ingraham and Andrews, against a school principal and two assistant principals in the same school. The damages sought are for personal injuries sustained by the students as a result of corporal punishment having been administered by the individual defendants. The plaintiffs allege jurisdiction based upon 28 U.S.C. § 1331 and 1343 and 42 U.S.C. § 1981-1988.

By separate order, the Court has dismissed the Third Count. In dismissing the Third Count, the Court has ruled, with respect to the school system as a whole, that corporal punishment of students, either in and of itself, or as authorized by the Dade County School Board's policy and regulation, or as administered generally in the school system, does not violate any constitutional rights possessed by the class composed of all students in the system. That ruling precludes the individual plaintiffs from recovery in their actions for damages on any of the theories advanced, unless upon the evidence concerning the particular punishment given to them by the individual defendants, the law would permit a jury to find that the punishments were of such nature and of such severity as to constitute "cruel and unusual punishment", in the constitutional sense, as prohibited by the Eighth Amendment.

Corporal punishment might be meted out under circumstances and with such severity as to amount to a deprivation of a constitutional right and thus give rise to recovery in a "civil rights" case.

Plaintiff Ingraham's case rests on one instance of punishment, during which he received 20 licks with a wooden paddle, which produced a painful and serious hematoma on his buttocks. Plaintiff Andrews was paddled several times, receiving no more than 5 licks on any one occasion. The paddlings caused painful bruises on Andrews' buttocks.

The undisputed facts regarding Ingraham and Andrews cannot demonstrate the elements of severity, arbitrary infliction, unacceptability in terms of contemporary standards, or gross disproportion which are necessary to bring "punishment" to the constitutional level of "cruel and unusual punishment". Therefore, a jury could not lawfully find that either of these

plaintiffs sustained a deprivation of rights under the Eighth Amendment.

As recited, the evidence concerning the administration of corporal punishment to Plaintiffs Ingraham and Andrews and the results of that punishment were presented before the trial judge on Count Three of Plaintiffs' complaint. It was later agreed that the evidence so presented would be the evidence presented to a jury should a jury be impanelled to try Counts One and Two. Had the Court undertaken to try Counts One and Two before a jury and then found itself in position of granting a directed verdict on plaintiffs' civil rights claims, under the theory of pendent jurisdiction the Court would have submitted to that jury the question of whether or not these plaintiffs have suffered damages as a result of torts committed against them by defendants. But pendent jurisdiction is to be exercised in the discretion of the Court depending upon the circumstances of each case. Were this Court to set about now to try assault and battery cases or cases regarding whether or not the defendants corporally punished the plaintiffs without authority to do so, no judicial time would be conserved and this Court would be trying a matter which lies within the authority of the state courts.

Accordingly, the Defendants' motion now before the Court is granted, and it is thereupon

ORDERED and ADJUDGED that the First and Second Counts in the Plaintiffs' complaint are hereby dismissed.

DONE and ORDERED at Miami, in the Southern District of Florida, this 23rd day of February, 1973.

JOE EATON,  
*United States District Judge.*

United States District Court, Southern District of Florida

(Case No. 71-23-CIV-JE)

ELOISE INGRAHAM, ET AL., PLAINTIFFS

vs.

WILLIE J. WRIGHT, ET AL., DEFENDANTS

*Order of Dismissal as to Count Three of Plaintiffs' Complaint*

THIS CAUSE is before the Court on motion of the Defendants for dismissal of the Third Count of Plaintiffs' Complaint,

made pursuant to Rule 41(b) after the completion of the presentation of the Plaintiffs' evidence at trial without a jury.

The Third Count in the complaint is a class action filed on behalf of all students in the Dade County public school system, seeking injunctive and declaratory relief abolishing the use of corporal punishment by school officials throughout the school system. Plaintiffs urge that any form of corporal punishment in the public schools is *per se* unconstitutional, and that the defendant School Board's policy which authorizes and regulates the use of corporal punishment is unconstitutional on its face, and as applied throughout the system.

Plaintiffs allege that the infliction of corporal punishment by public school officials on students abridges the "privileges and immunities" of the students. As in the case of *Sims v. Board of Education of Independent School District No. 22*, 329 F. Supp. 678 (D. New Mexico, 1971), where a school district's policy and practice of corporal punishment was unsuccessfully challenged, the complaint does not particularize "privileges" and "immunities". It utilizes the language of the complaint in *Sims* that corporal punishment abridges students' "rights to physical integrity," "dignity of personality", and "freedom from arbitrary authority." Such allegations characterize what are generally known as invasions of the right of privacy.

Plaintiffs further allege that infliction of corporal punishment deprives students of "liberty without due process of law" in violation of the Fourteenth Amendment of the Constitution of the United States in that it is administered arbitrarily and capriciously inflicted and is unrelated to the achieving of any legitimate educational purpose. Further, Plaintiffs stress that the infliction of corporal punishment on public school students constitutes such "cruel and unusual punishment" as is prohibited by the Eighth Amendment. As in *Sims*, Plaintiffs stress that corporal punishment subjects the student to humiliation and that the "psychological harm done plaintiffs and the other members of the class by the infliction of corporal punishment is substantial and lasting."

As the basis for federal jurisdiction, the Plaintiffs rely upon the provisions of 28 U.S.C. Sections 1331 and 1343, and of 42 U.S.C. Sections 1981-1988, which considered together authorize relief only upon proof of the deprivation, under color of state



law or authority, of any right, privilege or immunity secured by the Constitution or laws of the United States.

After consideration of the evidence and extensive argument of counsel, the Court makes the findings of facts and conclusions of law that follow.

#### FINDINGS OF FACT

1. The Dade County public school system is the sixth largest in the nation, with approximately 12,500 teachers and administrative personnel operating 237 schools with a total student population in excess of 242,000.

2. Corporal punishment is one of a variety of measures employed in the school system for the correction of pupil behavior and the preservation of order. Other alternative measures in use range from parent and student conferences, the use of guidance counselors and psychologists, where available, to suspension and expulsion. Corporal punishment is not utilized at all in sixteen schools in Dade County.

3. Statutory authority for the use of corporal punishment in Florida is found in Florida Statutes, § 232.27, which deals with the duties of teachers in the control of pupils, but provides that a teacher " \* \* \* shall not inflict corporal punishment before consulting the principal or teacher in charge of the school. \* \* \* " The Defendant School Board's policy as it existed when this suit was filed is more restrictive. It requires the principal to determine the necessity for corporal punishment, and to designate the time, place and person to administer the punishment, and in other ways limits the circumstances in which the punishment may be used. The policy was revised in November, 1971, and supplemented with detailed regulations, which prescribe additional limitations upon the nature, extent and circumstances of permissible punishment.

4. There is no published schedule of infractions for which corporal punishment is authorized, nor any formal procedural requirements which must be observed before punishment may be administered.

5. There has been a rather widespread failure to adhere to School Board policy regarding corporal punishment. Teachers have punished students without first consulting with their respective principals. More blows have been administered to students than authorized by the policy. Teachers have admin-

istered corporal punishment with only the student or students present. With the exception of a few cases, the punishments administered have been unremarkable in physical severity.

The instances of punishment which could be characterized as severe, accepting the students' testimony as credible, took place in one junior high school.

#### DISCUSSION

Plaintiffs rely heavily upon the rationale of *Jackson v. Bishop*, 404 F. 2d 571 (8th Cir., 1968). They say that no rule or regulation as to the use of the paddle, however seriously or sincerely conceived and drawn, will successfully prevent teachers' abuse of students. *Jackson* is distinguishable from the case before this Court. In *Jackson* the superintendent of the Arkansas State Penitentiary and all personnel of the penitentiary system were restrained from inflicting corporal punishment, including the use of the strap, as a disciplinary measure. *Jackson* held "that the use of the strap upon prisoners offended contemporary concepts of decency and human dignity" and that "public opinion is obviously adverse" to the use of the strap upon prisoners. It has not been shown in the case before this Court that the use of the paddle in the public schools "offends contemporary concepts of decency, and human dignity." Neither has it been shown that public opinion is "obviously adverse" to the use of the paddle.

The Court in *Jackson* found that the use of the strap in prisons was unusual. This record discloses that the use of the paddle in public schools throughout the country is "usual."

A Three Judge Court sitting in the Northern District of Georgia, Newnan Division, in the case of *Whatley v. Pike County Board of Education*, Civil Action No. 977, Sept. 22, 1971 [Unreported], distinguished *Jackson* from the case before the Three Judge Court. The Three Judge panel pointed out the large number of states which condone the moderate use of corporal punishment, and the universal abolition of whipping in the penitentiaries—where such punishment offends the public conscience. The Court, in *Whatley*, held flatly that the infliction of corporal punishment upon deserving pupils offends no notion of cruel and unusual punishment as the terms are constitutionally construed.

In *Ware v. Estes*, 328 F. Supp. 657, (N.D. Texas, 1971) *aff'd per curiam*, 458 F. 2d 1360 (5th Cir., 1972) the plaintiffs charged that any corporal punishment administered without parental or student consent deprived them of due process because any utilization of corporal punishment is arbitrary capricious and unrelated to any legitimate purpose. Plaintiffs in *Ware*, also charged that corporal punishment constitutes cruel and unusual punishment. District Judge Taylor, after having heard the evidence, had no doubt that the practice of corporal punishment had been abused by some of the seven thousand odd teachers in the Dallas Independent School District.<sup>1</sup> From the evidence presented before this Court, there is no doubt that the practice of corporal punishment has been abused by some of the teachers in the Dade County school system.

The fact that corporal punishment, inflicted in some of the schools in Dade County, may be harsh, oppressive and of doubtful propriety, does not, under the law, demonstrate constitutional invalidity. The Courts are the guardians of the liberties of the people against deprivations of constitutional rights. The Courts have no right to determine the expediency, necessity, wisdom, utility or propriety of official conduct so long as constitutional principles are not violated. It is not within this Court's authority to pass judgment upon the merits of corporal punishment as an educational tool or a means of discipline. The Florida legislature and the Dade County School Board have the authority and the duty to decide whether or not corporal punishment should continue in the schools of Dade County and of Florida. It is the duty of the Courts not to usurp the authority vested in the legislative executive branches of government.

After having heard the testimony in this case, this Court believes that corporal punishment may be administered in such a way that the resultant psychological harm to some students will be substantial and lasting. Sixteen principals in the Dade County School system reject the idea that order is better maintained and the learning process enhanced by the use of the board upon the body of the dominated. Nevertheless, as ex-

<sup>1</sup> In his opinion Judge Taylor pointed out that one of the plaintiffs in that case had been knocked unconscious by an assistant principal. The assistant principal was suspended from his duties for several months and at the time of the writing of the opinion, was facing criminal charges for assault upon a minor.

pressed by Mr. Chief Justice Burger, concurring in *Palmer v. Thompson*, 403 U.S. 217, 91 S. Ct. 1940, 29 L. Ed. 2d 438, a case not otherwise in point, "All that is good is not commanded by the Constitution and all that is bad is not forbidden by it."

#### CONCLUSION OF LAW

1. The Court has jurisdiction in the cause.
2. Corporal punishment of public school students, neither in and of itself, nor as prescribed and regulated in the Dade County School Board's policy and regulation, nor as administered in the school system, constitutes "cruel and unusual punishment" within the intent of the Eighth Amendment to the Constitution. Considering the system as a whole, there is no showing of severe punishment degrading to human dignity, nor of the arbitrary infliction of severe punishment, nor of the unacceptability to contemporary society of corporal punishment in the schools, nor of excessive or disproportionately severe punishment.
3. Corporal punishment of public school students, neither in and of itself, nor as prescribed and regulated in the Dade County School Board's policy and regulation, nor as administered in the school system, constitutes a deprivation of "liberty without due process of law" in violation of the Fourteenth Amendment to the Constitution. The evidence has not shown that corporal punishment in concept, or as authorized by the School Board, or as applied throughout the school system, is arbitrary, capricious, unreasonable or wholly unrelated to the legitimate state purpose of determining its educational policy. Consideration of what procedural due process may require under any given set of circumstances must begin with the determination of the precise nature of the governmental function involved. Neither a formal code of offenses, nor formal procedural steps such as notice, hearing and representation of counsel have been required by the law as constitutional precludes to corporal punishment of students.

The concept of due process is premised upon fairness and reasonableness in light of the totality of the circumstances then existing. The due process limitation does not unduly confine officials who have the responsibility of governing. Whether the constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors.



It seems to this Court that if there is any good purpose to be served by corporal punishment in the schools, such purpose would be long since passed if formal notice and hearing were required before a paddling. There has been no deprivation of "due process."

4. The other constitutional claims alleged by the plaintiffs are without merit. The use of corporal punishment by school authorities does not abridge any privileges or immunities guaranteed to students by the Constitution of the United States.

Accordingly, the defendants' motion for dismissal is granted, and it is thereupon

ORDERED and ADJUDGED that the Third Count of Plaintiffs' complaint is dismissed.

DONE and ORDERED at Miami, in the Southern District of Florida this 23rd day of February, 1973.

JOE EATON,  
*United States District Judge.*

In the United States District Court in and for the Southern District of Florida

(Case No. 71-23-Civ-JE)

ELOISE INGRAHAM, ET AL., PLAINTIFFS

v.

WILLIE J. WRIGHT, I, ET AL., DEFENDANTS

*Notice of Appeal*

Notice is hereby given that ELOISE INGRAHAM, as next friend and Mother of JAMES INGRAHAM, a minor, and WILLIE EVERETT, as next friend and Father of ROOSEVELT ANDREWS, a minor, on behalf of themselves and all others similarly situated, Plaintiffs above named, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Order Dismissing the First and Second Causes of Action and from the Order Dismissing the Third Cause of Action entered in this cause on or about the 23rd day of February 1973.

ALFRED FEINBERG,  
*Attorney for Plaintiffs, Legal Services of Greater Miami, Inc., 395 Northwest First Street, Suite 202, Miami, Florida 33128.*

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. Mail upon Frank Howard, Attorney At Law, Dade County Board of Public Instruction, 1410 N. E. Second Avenue, Miami, Florida and Leland Stansell, Attorney At Law, 10th Floor Biscayne Building, 19 West Flagler Street, Miami, Florida 33130 this 8 day of March, 1973.

ALFRED FEINBERG,  
*Attorney for Plaintiffs.*

ORIGINAL PANEL POSITION

United States Court of Appeals, Fifth Circuit

No. 73-2078.

ELOISE INGRAHAM, AS NEXT FRIEND, ETC., ET AL., PLAINTIFFS-  
APPELLANTS

v.

WILLIE J. WRIGHT, I, INDIVIDUALLY, ETC., ET AL., DEFENDANTS-  
APPELLEES

July 29, 1974

Appeal from the United States District Court for the Southern District of Florida

Before RIVES, WISDOM and MORGAN, Circuit Judges

RIVES, Senior Circuit Judge:

More than a century ago, a member of the Supreme Court of Indiana made the following observation:

The husband can no longer moderately chastise his wife; nor, according to the more recent authorities, the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the schoolboy, "with his shining morning face," should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained.

Cooper v. McJunkin, 1853 (4 Ind. (Porter) 290 (Stuart, J.)). In the present case, we consider constitutional issues related to corporal punishment in the public school system of Dade County, Florida.

Plaintiffs filed on January 7, 1971, a complaint containing three counts. Counts One and Two were individual actions for compensatory and punitive damages brought by two junior high school students under 42 U.S.C. §§ 1981-1988, with jurisdiction claimed under 28 U.S.C. § 1331 and § 1343. The students claimed personal injuries resulting from corporal punishment administered by certain defendants in alleged violation of their constitutional rights. Count Three of the complaint was a class action, also brought under 42 U.S.C. §§ 1981-1988, with jurisdiction claimed under 28 U.S.C. § 1331 and § 1343. This class action filed on behalf of all students in the public school system of Dade County sought injunctive and declaratory relief against the use of corporal punishment throughout the county school system.

The plaintiffs presented their evidence on Count Three of the complaint in a week long trial before the district court without a jury. Those who testified included sixteen students or former students, several parents and other relatives of students, a professor of educational psychology, and a number of school teachers and administrators, including the defendant Superintendent Edward Whigham. The evidence also included a photograph, stipulations, answers to interrogatories, school records and medical reports. At the close of the plaintiffs' case, the defendants moved for dismissal under Rule 41(b), F.R. Civ. P., which in relevant part provides:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

The district court noted in its order that counsel for the parties then agreed that the evidence offered to support Count Three "would also be considered by the Court, as if upon motion for directed verdict, as having been offered on Counts One and Two, provided that certain additional testimony desired by plaintiffs' counsel were placed in the record by deposition or stipulation." Thus, this case really involves one equity case, styled Count Three, and two law cases, styled Counts One and Two. The additional testimony was summarized in a stipulation. On February 23, 1973, the district court first dismissed Count Three of the complaint, and then concluded that a jury could not lawfully find that either of the plaintiffs in Counts One and Two sustained a deprivation of constitutional rights.

We hold that the district court erred in dismissing each of the three counts of plaintiffs' complaint, and, therefore, reverse and remand for further proceedings.

## I

### JURISDICTIONAL ISSUES

A. Defendants assert that there is no federal jurisdiction over Count Three under 42 U.S.C. §§ 1981-1988 and 28 U.S.C. § 1331 and § 1343, because the Dade County School Board and the Superintendent of Schools in their official capacities are not "persons" amenable to civil rights actions. In support of this claim defendants cite *City of Kenosha v. Bruno*, 1973, 412 U.S. 507, 93 S. Ct. 2222, 37 L. Ed. 2d 109. In *City of Kenosha*, the Supreme Court held that two municipalities in Wisconsin were not "persons" within the meaning of 42 U.S.C. § 1983. In *Campbell v. Masur*, 5 Cir. 1973, 486 F. 2d 554, where a plaintiff sued a school superintendent and a school board in their official capacities only, the court sent the case back to the district court for re-examination and further consideration in light of *City of Kenosha*.<sup>1</sup>

[1] Plaintiff sued a school superintendent and a school board in their official capacities only, the court sent the case back to the district court for re-examination and further consideration in light of *City of Kenosha*.<sup>1</sup>

<sup>1</sup> Also see *Oheranic v. Tucker*, 5 Cir. 1974, 498 F. 2d 586, 587, where this Court held that various arms of the state government of Louisiana, such as the Department of Highways, are not persons within the meaning of 42 U.S.C. § 1983.



[1] Plaintiffs have sued Superintendent of Schools Edward L. Whigham in his individual capacity, as well as in his official capacity.<sup>2</sup> It is clear that the school superintendent, sued as an individual, is a "person" within the meaning of § 1983. *Sterzing v. Fort Bend Independent School District*, 5 Cir. 1974, 496 F. 2d 92, p. 93, n. 2; *United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach*, 5 Cir. 1974, 493 F. 2d 799. To hold otherwise would suggest the impossibility of suing any government official or employee under § 1983. *City of Kenosha, supra*, does not require or even intimate the possibility of such a result. The right to bring a § 1983 action against a state or local official is well established. See *Monroe v. Pape*, 1961, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492, and its progeny. Also see *Moor v. County of Alameda*, 1973, 411 U.S. 693, 700, 93 S. Ct. 1785, 36 L. Ed. 2d 596.

[2] Prior to the decision in *City of Kenosha*, a number of courts had held that cities were proper defendants under § 1983 where equitable relief was sought. See discussion in *City of Kenosha v. Bruno, supra*, 412 U.S. at 512-514, and at 516ff, 93 S. Ct. 2222 (Douglas, J., dissenting in part). The complaint in the present case, and all of the proceedings in the district court, occurred before *City of Kenosha* was decided. Taking these factors into consideration, the district court should on remand grant the likely request of plaintiffs to add the individual members of the Dade County School Board as parties defendant under Count Three of the complaint. Without regard to whether the plaintiffs may ultimately be entitled to any equitable relief against the School Board or its members, fairness and efficient judicial administration justify the addition of the individual school board members as parties insofar as the plaintiffs seek declaratory and equitable relief restraining the School Board from authorizing or implementing corporal punishment in Dade County. See Rule 21, F.R. Civ. P.; *Mullaney v. Anderson*, 1952, 342 U.S. 415, 72 S. Ct. 428, 96 L. Ed. 458; *United States v. Louisiana*, 1957, 354 U.S. 515, 77 S. Ct. 1373, 1 L. Ed. 2d 1525; *Halladay v. Verschoor*, 8 Cir. 1967, 381 F. 2d 100; *Rakes v. Coleman*, E.D. Va. 1970, 318 F. Supp. 181; 3A Moore ¶ 31.05[1].

<sup>2</sup> Willie J. Wright, I (a principal), Lemmie Delliford (an assistant principal) and Solomon Barnes (an assistant to a principal) have each also been sued in his official and individual capacity.

[3-5] B. Although not argued by the parties on this appeal, it is appropriate to examine whether Count Three of the instant case should have been heard by a three-judge district court.<sup>3</sup> Though neither party requested a three-judge district court, consent, either implied or express, cannot authorize a single judge to hear a case that falls within the terms of 28 U.S.C. § 2281. *Sands v. Wainwright*, 5 Cir. 1973, 491 F. 2d 417, 424 (en banc); *Borden Co. v. Liddy*, 8 Cir. 1962, 309 F. 2d 871; *Americans United for Sep. of Church & State v. Paire*, 1 Cir. 1973, 475 F. 2d 462. The district court in the present case considered the question and ruled that a three-judge district court was not required. We agree.

Plaintiffs sought injunctive relief restraining the defendants, their agents and employees from inflicting any form of corporal punishment upon students in the Dade County public school system.<sup>4</sup> Plaintiffs did not request an injunction restraining the enforcement of any specific Florida statute, and in oral argument before this Court, counsel for plaintiffs stated, "We are not challenging the constitutionality of the Florida statute." Section 232.27 of Florida Statutes Annotated, provides:

Each teacher or other member of the staff of any school shall assume such authority for the control of the pupils as may be assigned to him by the principal and shall keep good order in the classroom and in other places in which he is assigned to be in charge of pupils, but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unduly severe in its nature.

The injunctive relief sought by plaintiffs would not conflict with this provision, and would not extend beyond Dade County. By establishing limits upon the administration of

<sup>3</sup> Counts One and Two, which are individual actions for damages, clearly do not require a three-judge district court. Therefore, if it were determined that a three-judge court is necessary to decide Count Three, we would still be obliged to consider most or all of the underlying facts in this case in order to review the district court's disposition of Counts One and Two.

<sup>4</sup> Plaintiffs' request for injunctive relief restraining the defendants from administering corporal punishment in Charles R. Drew Junior High School is obviously included within the larger request for injunctive relief throughout the entire county system.

corporal punishment, the statute inferentially permits local school boards to authorize such punishment. This statute does not mandate or require corporal punishment, however, nor does it compel local school boards to adopt regulations providing for corporal punishment. In fact, the statute would not prevent a local board from prohibiting corporal punishment in certain grade levels or throughout a county system.

The Dade County School Board adopted a policy which affirmatively authorized the use of corporal punishment in Dade County schools. It is the implementation of this policy, and the practices which have developed in Dade County under the authority of this policy, particularly in one junior high school, which the plaintiffs seek to enjoin. Although a regulation authorizing corporal punishment is consistent with F.S. 232.27, F.S.A. an injunction restraining the named defendants, their agents and employees from the use of corporal punishment would not require the invalidation of the Florida statute, and would not directly affect any county in Florida other than Dade County. Count Three, therefore, comes within the rule that where a challenged regulation or policy is of only local import, a single judge must hear the case. *Board of Regents of University of Texas System v. New Left Education Project*, 1972, 404 U.S. 541, 92 S. Ct. 652, 30 L. Ed. 2d 697; *Moody v. Flowers*, 1967, 387 U.S. 97, 87 S. Ct. 1544, 18 L. Ed. 2d 643; *Griffin v. School Board of Prince Edward County*, 1964, 377 U.S. 218, 327, 328, 84 S. Ct. 1226, 12 L. Ed. 2d 256; *Rorick v. Board of Commissioners*, 1939, 307 U.S. 208, 59 S. Ct. 808, 83 L. Ed. 1242; *Ex parte Public National Bank*, 1928, 278 U.S. 101, 49 S. Ct. 43, 73 L. Ed. 202; *Ex parte Collins*, 1928, 277 U.S. 565, 48 S. Ct. 585, 72 L. Ed. 990; *Sands v. Wainwright*, 5 Cir. 1973, 491 F. 2d 417 (en banc).

## II

### THE FACTS

As to the district court's findings or treatment of facts, appellate review is governed by one rule applicable to Count

Three and by a different rule applicable to Counts One and Two. We have heretofore indicated that there were two separate orders of dismissal. Count Three was dismissed under Rule 41(b), F.R. Civ. P. "on the ground that upon the facts and the law the plaintiff has shown no right to relief." As authorized by that rule, the district court in effect rendered judgment on the merits against the plaintiffs and made findings as provided in Rule 52(a). See *Emerson Electric Co. v. Farmer*, 5 Cir. 1970, 427 F. 2d 1082, 1086; *Wright & Miller*, Federal Practice & Procedure § 2371; *Moore's Federal Practice* ¶ 41.13[4]. The district court's order of dismissal as to Counts One and Two correctly recognized that, "The issue now before the Court is whether the evidence, viewed most favorably to plaintiffs is sufficient to permit a jury to return a verdict for plaintiffs on either or both of the First and Second Counts." On that issue, our review of the sufficiency of the evidence is governed by the familiar rule enunciated in *Boeing Company v. Shipman*, 5 Cir. 1969, 411 F. 2d 365, 374-375.

In its order of dismissal as to Count Three, the district court listed its "Findings of Fact" as follows:

1. The Dade County public school system is the sixth largest in the nation, with approximately 12,500 teachers and administrative personnel operating 237 schools with a total student population in excess of 242,000.

2. Corporal punishment is one of a variety of measures employed in the school system for the correction of pupil behavior and the preservation of order. Other alternative measures in use range from parent and student conferences, the use of guidance counselors and psychologists, where available, to suspension and expulsion. Corporal punishment is not utilized at all in sixteen schools in Dade County.

3. Statutory authority for the use of corporal punishment in Florida is found in Florida Statutes, § 232.27, which deals with the duties of teachers in the control of pupils, but provides that a teacher " \* \* \* shall not inflict corporal punishment before consulting the principal or teacher in charge of the school \* \* \*." The Defendant School Board's policy



as it existed when this suit was filed is more restrictive. It requires the principal to determine the necessity for corporal punishment, and to designate the time, place and person to administer the punishment, and in other ways limits the circumstances in which the punishment may be used. The policy was revised in November, 1971, and supplemented with detailed regulations, which prescribe additional limitations upon the nature, extent and circumstances of permissible punishment.

4. There is no published schedule of infractions for which corporal punishment is authorized, nor any formal procedural requirements which must be observed before punishment may be administered.

5. There has been a rather widespread failure to adhere to School Board policy regarding corporal punishment. Teachers have punished students without first consulting with their respective principals. More blows have been administered to students than authorized by the policy. Teachers have administered corporal punishment with only the student or students present. With the exception of a few cases, the punishments administered have been unremarkable in physical severity.

The instances of punishment which could be characterized as severe, accepting the students' testimony as credible, took place in one junior high school.

We agree with and accept the expressed findings of the district court. However, those findings are somewhat meager considering the voluminous evidence presented in this case, and it is therefore appropriate for us to detail more fully what the testimony and other evidence reveals.

Dade County School Board Policy 5144 expressly authorizes the use of corporal punishment, and prescribes the procedures to be followed where a teacher feels that corporal punishment is necessary.<sup>5</sup> During the 1970-71 school year,

<sup>5</sup> During the 1970-71 school year, Policy 5144 provided in relevant part as follows:

"II. Punishment: Corporal Punishment "Punishment in the general sense is the inflicting of a penalty for an offense. Corporal punishment is generally applied to the body of the offender or is physical punishment as opposed to other forms of punishment and is administered as a means of changing the

Policy 5144 provided among other things, that the punishment be administered "in kindness and in the presence of another adult" and that "no instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck."

The evidence shows that corporal punishment in Dade County during the relevant period consisted primarily, if not entirely, of "paddling." Paddling involves striking the student with a flat wooden instrument<sup>6</sup> usually on the buttocks. The district court recognized that the evidence revealed "a rather widespread failure to adhere to School

behavior of the student. Therefore, it is important to analyze whether or not this goal will be accomplished by such action.

"Corporal punishment may be used in the case where other means of seeking cooperation from the student have failed. If it appears that corporal punishment is likely to become necessary, the teacher must confer with the principal. The principal will determine the necessity for corporal punishment and designate the time, place, and the person to administer said punishment. In any case, the student should understand clearly the seriousness of the offense and the reason for the punishment. Care should be taken that the period of time between the offense and the punishment is not so long as to cause undue anxiety in the pupil. The punishment must be administered in kindness and in the presence of another adult, at a time and under conditions not calculated to hold the student up to ridicule or shame.

"In the administering of corporal punishment, no instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck. The person administering the corporal punishment must realize his own personal liabilities if the student being given corporal punishment is physically injured.

"Corporal punishment should never be administered to a student whom school personnel know to be under psychological or medical treatment unless there has been a pre-conference with the school psychologist or the physician."

On November 3, 1971, almost ten months after this action was filed, Policy 5144 was extensively revised. As indicated by the district court, this revision included "detailed regulations, which prescribe additional limitations upon the nature, extent and circumstances of permissible punishment."

<sup>6</sup> We recognize that the term "paddling" is a word of art. Plaintiffs in their brief refer to "beating." Similarly, the punishment is described in terms of "licks" and "blows," and the instruments of punishment are referred to as "paddles" and "boards."

<sup>7</sup> Paddle size was not prescribed during 1970-71. Most paddles probably were within the range indicated by the November 3, 1971 revision of Policy 5144: "The instrument must be of wood and be no more than two feet long nor more than one-half inch thick and no more than four inches wide."

Board policy regarding corporal punishment." Many of the student witnesses gave testimony which indicated that their teachers in various schools did not always consult with the principal of the school before administering corporal punishment. A number of non-principals admitted in their answers to interrogations that they did not "regularly and routinely" confer with the principal before paddling students.<sup>8</sup> Student testimony also indicated, and the district court found, that teachers sometimes administered corporal punishment with only the student or students present, whereas school board policy required the presence of another adult during the administration of corporal punishment.

In at least 16 of the 231 Dade County schools, corporal punishment was not utilized in the 1970-71 school year.<sup>9</sup> The evidence suggests that in most of those schools which did use corporal punishment, the punishment was normally limited to one or two licks, or sometimes as many as five, with no apparent physical injury to the children who were punished. Quoting from the district court's findings of fact, "The instances of punishment which could be characterized as severe \* \* \* took place in one junior high school." This school was Charles R. Drew Junior High School, and the occurrences there merit description.

The experiences of individual students at Drew reveal the nature of the system of corporal punishment utilized at this educational institution. On October 6, 1970, a number of students, including fourteen-year-old James Ingraham, a named plaintiff, were slow in leaving the stage of the school auditorium when asked to do so by a teacher. A number of boys and girls involved in this incident were taken to the principal's office and paddled. James protested,

<sup>8</sup> By stipulation dated October 10, 1971, the parties agreed that, "The total number of persons with the Dade County School System, other than school principals, who administered corporal punishment but did not regularly and routinely confer with the principal of the school in which they were employed during the school year commencing September 1970 was 59 (fifty-nine) prior to each paddling." (R. 1435) This stipulation was based on questionnaires prepared by the plaintiffs and completed by school officials and employees.

<sup>9</sup> At least 10 of these schools did not administer corporal punishment as a matter of school policy. See stipulation of October 10, 1972. Also see district court finding 2.

claiming he was innocent, and refused to be paddled. Willie J. Wright, I, the principal called for the assistance of Lemmie Deliford, the assistant principal in charge of administration, and Solomon Barnes, an assistant to the principal. Barnes and Deliford held James by his arms and legs and placed him, struggling, face down across a table. Wright administered at least twenty licks.<sup>10</sup> After the paddling, Wright told James to wait outside his office—"he said if I move he was going to bust me on the side of my head"—(Tr. 144), but James went home anyway.

At home, James examined his injuries; according to him, his backside was "black and purple and it was tight and hot." (Tr. 146) James' mother took him to a local hospital. The examining doctor diagnosed the cause of James' pain to be a "hematoma." "The area of pain was tender and large in size, and \* \* \* the temperature of the skin area of the hematoma was above normal which is a sign of inflammation often associated with hematoma."<sup>11</sup> The doctor prescribed pain pills, a laxative, sleeping pills and ice packs, and advised James to stay at home for at least a week (Tr. 148). A different doctor examined James on October 9, when he returned to the hospital for treatment, and on October 14. This doctor described James' injury as follows: "The patient's subjective [sic] signs of injury included a hematoma approximately six inches in diameter which was swollen, tender and purplish in color. Additionally, there was serousness or fluid oozing from the hematoma."<sup>12</sup> On October 14, eight days after the paddling, this doctor indicated that James should rest at home "for next 72 hours."<sup>13</sup> James testified that it was painful even to lie on his back in the days following the padding, and that he could not sit comfortably for about three weeks (Tr. 149).

Roosevelt Andrews, the other named plaintiff, testified that he was paddled about ten times in one year at Drew (Tr. 273). He was paddled a number of times by his

<sup>10</sup> The district court found that James Ingraham "received 20 licks with a wooden paddle, which produced a painful and serious hematoma on his buttocks." (R. 1561)

<sup>11</sup> Stipulated testimony of Dr. Fernando Milanes (R. 1557).

<sup>12</sup> Stipulated testimony of Dr. Carlos Gamez (R. 1558).

<sup>13</sup> Exhibit 8, in form of prescription signed by Dr. Gamez.



physical education teachers for being late or for not "dressing out."<sup>14</sup>

On one occasion, a teacher stopped Roosevelt, told him he could not possibly get to his next class in time and then took him to Barnes. Barnes told Roosevelt to go into a bathroom with a number of other boys. Barnes allegedly lined about 15 boys up against the urinals and paddled them. According to Roosevelt, the blows must have hurt, because some of the boys were "hollering, cry, prayed, and everything else" [sic] (Tr. 294). After the other boys left, Roosevelt told Barnes that he would have made it to class if the teacher had not stopped him. Barnes told Roosevelt to bend over. Roosevelt refused. Then, according to Roosevelt, Barnes

pushed me against the urinate thing, the bowl, and then he snatched me around to it and that's when he hit me first. He first hit me on the backsides and then I stand up and he pushed me against the bathroom wall, them things—that part the bathroom, the wall \* \* \* Between the toilets, he pushed me against that and then he snatched me from the back there and that's when he hit me on my leg, then hit me on my arm, my back and then right across my neck, in the back here.

(Tr. 295.) Incensed over his treatment, Roosevelt complained to Wright, but Wright seemed to support Barnes, his co-administrator.

At a later time, Wright paddled Roosevelt, apparently for the breakage of some glasses in sheet metal class, although Roosevelt claimed it was not his fault. Roosevelt testified

<sup>14</sup> "Dressing out" refers to putting on the proper uniform for physical education class. According to Roosevelt, he was once paddled for not having white socks. His teacher refused to listen to his explanation that his socks had been stolen. On another occasion, Roosevelt was paddled for not having tennis shoes, although he tried to explain to the teacher that someone had stolen his shoes and that he could not get new ones because his family could not afford them.

Another student, Reginald Bloom, testified that he was paddled for not having gym shorts, although his shorts had been stolen. Other students at Drew and other schools also testified to paddlings in physical education class, for such offenses as not dressing out, lateness, talking at inappropriate times, and other minor misconduct. These paddlings normally consisted of one or two or sometimes three licks.

that during this paddling, his wrist was hit, and that painful swelling occurred. Roosevelt went to see a doctor about his wrist. The doctor gave him pain pills and advised him to keep something cold on his wrist.<sup>15</sup> For about a week his wrist hurt, and he could not use his arm.

Donald Thomas testified that Barnes carried a paddle with him when he walked around the school and that Deliford carried brass knuckles.<sup>16</sup> Donald further testified to a scheme of punishment used in the auditorium. The seats were numbered and each student had an assigned seat. If a student misbehaved, his number was put on the board. Then Barnes would come into the auditorium and paddle the students whose numbers were listed, without asking who had done what. About five to eight students were paddled every day, generally receiving four or five licks or so each. Donald claimed he was paddled under these circumstances between 5 and 10 times. Another student, Nicky Williams, who was paddled under this system, complained that Barnes would not listen to any explanations.

Daniel Lee, who was paddled "lots of times" (Tr. 463) at Drew, described how on one occasion Barnes had a number of students "in a line, holding onto the chair, already paddling them,"<sup>17</sup> and asked him to come over and "get a little piece of the board." (Tr. 480-481.) Daniel asked what he had done, and Barnes allegedly grabbed him and tried to throw him on the chair. In the ensuing confusion, Barnes

<sup>15</sup> Roosevelt's mother, Mrs. Willie Everett, supported Roosevelt's description of his wrist injury.

<sup>16</sup> James Ingraham, Roosevelt Andrews, Daniel Lee, Reginald Bloom, Ray Jones and Nicky Williams also testified that Barnes carried a paddle with him around the school. Mrs. Everett, Alphonse Hicks and Larry Jones saw Barnes at school with brass knuckles. Reginald Bloom claimed he saw Deliford with brass knuckles. The apparent visibility of the paddle and of the brass knuckles may have affected the atmosphere at Drew.

<sup>17</sup> As described by Daniel Lee and other witnesses, a student about to be paddled at Drew was sometimes required to bend over the back of a chair with his hands on the front of the seat of the chair. A number of witnesses testified that if the student let the chair go, or in some other fashion failed to take the punishment as prescribed, extra licks were given. Daniel Lee testified that on one occasion, Deliford told a group he was punishing that, "If you let go, if you let the chair go, every time you let the chair go, that's fifteen more licks. If you count to three and you don't be back down on the chair, that's fifteen more licks." (Tr. 479; see also 477.)

hit Daniel on the hand four or five times.<sup>18</sup> The hand swelled and hurt "and the bone was—it seems like the bone was going to come out" (Tr. 481), so Daniel's mother took him to the hospital for an X-ray. According to Daniel, a bone in his right hand was fractured. The Court, observing Daniel's hand, stated that "It seems to me to be disfigured, a portion of his right knuckle is enlarged to some degree." Daniel claimed that his hand still hurt, and swelled if he tried to use it.

Reginald Bloom testified that he was paddled at Drew about 15 times. One time Deliford paddled Reginald about fifty licks for allegedly making an obscene phone call to a teacher. Reginald claimed at the time that he had not made the call, and later another boy confessed to making it. Reginald testified on cross-examination that Deliford seemed to be hitting him as hard as he could, and that after the paddling was over, he had to go home because he couldn't sit down. A doctor examined Reginald's buttocks and prescribed ice packs. Reginald found it painful to sit down for about three weeks. Reginald's mother testified that her son's buttocks were "black and blue right across," swollen, and sore. She testified further that she applied ice packs to his buttocks for about three days or more after he was paddled. Another time Reginald and some other boys were called into the principal's office and accused of fighting on the way home from school. When the boys refused to be paddled, Deliford, Barnes and Wright allegedly manhandled one of the boys:

Mr. Deliford grabbed him and Mr. Barnes and Mr. Deliford started jumping on him, throwing him around the room in the office.

<sup>18</sup> On cross-examination, the following exchange occurred:

"Q. Are you telling the Court that Mr. Barnes hauled off and deliberately hit you on the hand?

"A. Yes, sir; because he tried to throw me against the chair, you know, and I wouldn't get over there and so he grabbed me and hit me on the hand with the board.

"Q. He was trying to hit you on the rear end, wasn't he?

"A. No.

"Q. Are you saying he deliberately hit you on the hand?

"A. Yes, sir.

"Q. That has made your hand swell up?

"A. Yes, sir." (Tr. 487-488.)

Then Mr. Wright, he got with Mr. Deliford and Mr. Barnes and started throwing the boy around the room, hitting him, throwing him on the table.

(Tr. 517.) The boy cried out that the men had broken his hand and two weeks later came back to school with a bandage on his hand. Reginald also testified that Barnes paddled boys for chewing gum and for not tucking in their shirttails.

Ray A. Jones and a boy named Carson were brought to the office at Drew by a policeman for "playing hooky." Deliford and Barnes gave each boy about fifty licks, causing both boys to cry. Two girls were present during this punishment and after the boys were paddled, the girls received about five licks each. Ray testified that he was unable to sit comfortably for about two weeks. Ray's grandmother stated that when she looked at Ray's buttocks, she saw "big swollen places."

Rodney Williams testified that because he wanted to wipe some foreign matter off his seat in the auditorium before sitting down, his number was put on the board and Barnes later took him to his office. Because he thought he was innocent, Rodney refused to "hook up."<sup>19</sup> Rodney testified that Barnes then hit him five or ten times on his head and back with a paddle, and then hit him with a belt. The side of Rodney's head swelled, and an operation proved necessary to remove a lump of some sort which had developed where Rodney had been struck. Rodney was out of school for about a week, and felt that the operation affected his memory and thinking. Another time, after Deliford had given him ten licks, Rodney's chest hurt and he threw up "blood and everything" (Tr. 601). Perhaps because he had asthma and heart trouble of some sort, Rodney also reacted to this paddling by "shaking all over" and "trembling," and required treatment at a local hospital. On a later occasion, a paddling by Wright again caused Rodney to cough up blood (Tr. 604).

Larry Jones testified that physical education teachers at Drew paddled him about ten times and that Deliford paddled him a "heap of times"—about ten. Several times Larry

<sup>19</sup> To assume a position standing in back of a chair, with hands on the seat of the chair, in preparation to being paddled.



received ten licks. On one occasion, when Larry refused to be paddled, "he [Deliford, or perhaps Barnes] had to start hitting me with that stick, and he put two knots on my head" (Tr. 651).

Janice Dean testified that, on her first day at Drew, she did not know about assigned seats in the auditorium and sat in the wrong place. As a result, Deliford gave her five licks. Another time, when Janice was sent to the office, Barnes administered fifteen licks, apparently without knowledge of the alleged misconduct, on a theory he allegedly explained as follows: "He said he knew we had done something wrong or we wouldn't have been there." (Tr. 819).

Preston Sharpe testified that during four years at Drew, Deliford paddled him about ten times. One time Preston was paddled for having his shirttail hanging out. Another time, when he was supposed to receive ten licks, Preston received five extra licks for not reassuming a paddling position quickly enough after one of the licks, and three extra licks for allowing the chair to move and hit a door.

Nathaniel Evans testified that during one year at Drew, he was paddled four times. On one occasion, when the typing class was noisy, Barnes gave each of the fifteen students five licks. Another time, when Barnes was trying to find out who had been whistling, he took a class of 30-50 students and methodically began to paddle each student in an attempt to locate the one who had been whistling. After about half of the class had been paddled, some students told Barnes who had whistled, and the rest of the class was spared. Nathaniel received ten licks on another occasion when his name, along with six others, was written on the board in the auditorium.

### III

#### CRUEL AND UNUSUAL PUNISHMENT

[6] The Eighth Amendment prohibits the infliction of "cruel and unusual punishment." It is applicable to the states through the due process clause of the Fourteenth Amendment. *Robinson v. California*, 1962, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758; *Furman v. Georgia*, 1973, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346.

[7-9] A number of federal courts have held that corporal punishment of school children is not *per se* a violation of the constitutional prohibition against cruel and unusual punishment. *Ware v. Estes*, N.D. Tex. 1971, 328 F. Supp. 657, *aff'd per curiam* 5 Cir. 1972, 458 F. 2d 1360; *Whitley v. Pike County Board of Education*, N.D. Ga. 1971, C.A. 977 (three-judge district court); *Glaser v. Marietta*, W.D. Pa. 1972, 351 F. Supp. 555; *Sims v. Board of Education of Independent School Dist. No. 22*, D.N.M. 1971, 329 F. Supp. 678.<sup>20</sup> We agree that at the present time corporal punish-

<sup>20</sup> In *Gonyaw v. Gray*, D. Vt. 1973, 361 F. Supp. 366, 368, as one ground for dismissal of an action brought by parents of students subjected to corporal punishment, the court stated that, "This statute does not offend the protection against cruel and unusual punishment secured by the Eighth Amendment, since this amendment provides a limitation against penalties imposed for criminal behavior. \* \* \* Since neither plaintiff was punished for an offense which was criminal in nature, the Eighth Amendment does not proscribe the conduct assigned to the defendants." (Citations omitted.)

We find this approach unpersuasive. It was succinctly stated in Vol. 6 *Harv. Civ. Rights—Civ. Lib. L. Rev.*, *Corporal Punishment in the Public Schools*, p. 585 n. 24:

"In *Trop v. Dulles*, 356 U.S. 86, 94-100 [78 S. Ct. 590, 2 L. Ed. 2d 630] (1958), the Supreme Court, in applying the eighth amendment to all punishments inflicted pursuant to 'penal laws,' set forth two tests to determine the meaning of penal. First, there must be the imposition of a 'disability for the purpose of punishment.' *Id.* at 96 [78 S. Ct. 590]. Second, there must be the prescription of a 'consequence that will befall one who fails to abide by regulatory provisions \* \* \*.' *Id.* at 97 [78 S. Ct. 590].

"Infliction of corporal punishment by public school personnel meets both tests." Corporal punishment of schoolchildren is "punishment" in every sense of the word, whether it is called "criminal" or "civil." Cf. *In re Gault*, 1967, 387 U.S. 1, 17, 87 S. Ct. 1428, 18 L. Ed. 2d 527. Corporal punishment is used by state officials to punish students for misbehavior committed during attendance at school, and resembles statutorily prescribed punishments for crimes in its purposes and effects. Some of the offenses punished by corporal punishment are in fact essentially criminal in nature, such as assaults or destruction of property. No doubt for these reasons, most courts which have considered the constitutionality of corporal punishment have assumed that such punishment may be evaluated under eighth amendment standards. See especially *Nelson v. Heyne*, 7 Cir. 1974, 491 F. 2d 352, and *Bramlet v. Wilson*, 8 Cir. 1974, 495 F. 2d 714. In *Bramlet* the court said, "an excessive amount of physical punishment [in a public school setting] could be held to be cruel and unusual and therefore prohibited." The court also stated, "the designation of conduct as other than 'punishment' is simply a label of

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ment *per se* cannot be ruled violative of the Eighth Amendment. Mild or moderate use of corporal punishment as a disciplinary measure in an elementary or secondary school normally will involve only transitory pain of a non-intense nature and will not cause intense or sustained suffering or permanent injury. For this reason, although many might object to corporal punishment for a variety of reasons, such punishment *per se* cannot presently be held to be "excessive" in a constitutional sense,<sup>21</sup> or so "degrading" to the "dignity" of school children as to violate the Eighth Amendment.<sup>22</sup> Although the scope of the Eighth Amendment admittedly is not "static" and must draw its meaning from "evolving standards of decency," *Trop v. Dulles*, 1958, 356 U.S. 86, 101, 78 S. Ct. 590, 2 L. Ed. 2d 630, it is significant that a large number of states continue to authorize the use of moderate corporal punishment,<sup>23</sup> and that corporal punish-

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convenience and will not obviate an eighth amendment inquiry. *Knecht v. Gilman*, 488 F. 2d 1136 (8th Cir. 1973)."

In *Jackson v. Bishop*, 8 Cir. 1968, 404 F. 2d 571, and *Wright v. McMann*, 2 Cir. 1967, 387 F. 2d 519, courts found impermissible cruelty in offensive "punishments" devised by prison officials, and at least some members of the Supreme Court have acknowledged the propriety of these findings. See *Furman v. Georgia*, 1972, 408 U.S. 238, 384, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (Chief Justice Burger dissenting, joined by Justices Blackmun, Powell and Rehnquist). We think punishments devised by school officials are similarly subject to Eighth Amendment scrutiny. Paraphrasing the opinion in *In re Gault*, *supra*, 387 U.S. at 47, 87 S. Ct. 1428, it would indeed be surprising if the Eighth Amendment protected hardened criminals but not school children.

<sup>21</sup> *O'Neil v. Vermont*, 1892, 144 U.S. 323, 339, 12 S. Ct. 693, 36 L. Ed. 450 (Field, J., dissenting); *Furman v. Georgia*, *supra*, 408 U.S. at 279-280, 92 S. Ct. 2726 (Brennan, Jr., concurring).

<sup>22</sup> *Furman v. Georgia*, *supra*, 408 U.S. 271-273, 92 S. Ct. 2726 (Brennan, Jr., concurring); *Trop v. Dulles*, 1958, 356 U.S. 86, 100, 78 S. Ct. 590, 2 L. Ed. 2d 630.

<sup>23</sup> According to a Report of the Task Force on Corporal Punishment published in 1972 by the National Education Association, at p. 26, submitted by the plaintiffs, corporal punishment is banned by state law in New Jersey and Massachusetts, and by state school board policy in Maryland. It is also banned, according to this report, in a number of large cities. However, at p. 24 of the report, it is stated that 13 states specifically permit corporal punishment, while in other states the teacher is given the same authority as the parent to discipline the child, or is simply authorized to maintain order and discipline in the classroom. Although the situation may have changed

ment apparently is still utilized in many school systems. Faced with this evidence of what is apparently considered appropriate by the American people, we would be loath to suggest that at this time corporal punishment is "unacceptable to contemporary society," *Furman v. Georgia*, *supra*, 408 U.S. at 277-279, 92 S. Ct. 2726 (Brennan, J., concurring), or that it is "abhorred" by popular sentiment, *Furman v. Georgia*, *supra*, 408 U.S. at 332, 92 S. Ct. 2726 (Marshall, J., concurring).<sup>24</sup>

[10] Examining the specific policies on corporal punishment promulgated by the Dade County School Board, we find in them no violation of the Eighth Amendment. These policies do nothing more than authorize the mild or moderate use of such punishment. Policy 5144, revised effective August 5, 1970,<sup>25</sup> provides that the punishment must be administered "in kindness." "[N]o instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck." Further, corporal punishment "should never be administered to a student whom school personnel know to be under psychological or medical treatment unless there has

somewhat since 1972, apparently corporal punishment of school children is still allowed in a large number of jurisdictions. This contrasts with the circumstances in *Jackson v. Bishop*, 8 Cir. 1968, 404 F. 2d 571. In that case, where the court held that the use of the strap in the Arkansas prisons violated the Eighth Amendment, the court took into consideration the fact that only two states still permitted the use of the strap. See 404 F. 2d at 580.

<sup>24</sup> The dissenters in *Furman v. Georgia* emphasized the fact that "Capital punishment is authorized by statute in 40 States, the District of Columbia, and in the federal courts for the commission of certain crimes" (408 U.S. at 385, 92 S. Ct. at 2801), and that juries acting as "the conscience of the community" (408 U.S. at 388, 92 S. Ct. 2726), continued to impose capital punishment. See 408 U.S. at 385-391, 92 S. Ct. 2726 (Burger, C. J., dissenting). Justice Brennan suggests, however, that "The acceptability of a severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use." 408 U.S. at 279, 92 S. Ct. at 2747. The evidence showed that capital punishment had actually been imposed only rarely in recent years. See 408 U.S. at 291 n. 40, 92 S. Ct. 2726. The plaintiffs do not suggest that corporal punishment has become so offensive that it is no longer in general use in many States.

<sup>25</sup> Policy 5144 was revised again on December 9, 1970, but there were no substantive changes in those parts of the policy dealing with corporal punishment.



been a pre-conference with the school psychologist or the physician."

Policy 5144 was revised extensively effective November 3, 1971. This revision imposes specific limits on the number of strokes—a maximum of five strokes for elementary school children and a maximum of seven strokes for junior and senior high school children. It requires the use of an instrument "calculated to eliminate possible physical injury." The punishment must be administered "posteriorly," and "under no circumstances shall a student be struck about the head or shoulders." The former provision as to students under psychological or medical treatment is retained. Emphasis upon consideration of the "nature of the misconduct" and the "seriousness of the offense," and the requirement of recording the "infraction of rules which caused the punishment," make it clear that the punishment is not to be inflicted arbitrarily or without cause. This revision is not obnoxious to the Eighth Amendment; it represents an effort to insure through specific guidelines that corporal punishment in Dade County will not go beyond "the moderate use of physical force or physical contact, as may be necessary to maintain discipline and to enforce school order and rules."

Although Policy 5144 does not on its face conflict with the Eighth Amendment, it is necessary to inquire further and to determine whether corporal punishment as applied in the Dade County schools offends Eighth Amendment standards. In fact, we deem it more important to know how corporal punishment is actually administered than to know the relevant rules or regulations.<sup>20</sup>

<sup>20</sup> The opinion of Judge (now Justice) Blackmun in *Jackson v. Bishop*, 8 Cir. 1968, 404 F. 2d 571, 579, 580, finds that corporal punishment in prisons is difficult to adequately control by rules or regulations:

"We are not convinced that any rule or regulation as to the use of the strap, however seriously or sincerely conceived and drawn, will successfully prevent abuse. . . . Rules in this area seem often to go unobserved. . . . Regulations are easily circumvented. . . . Corporal punishment is easily subject to abuse in the hands of the sadistic and the unscrupulous. . . . Where power to punish is granted to persons in lower levels of administrative authority, there is an inherent and natural difficulty in enforcing the limitations of that power. . . . There can be no argument that excessive whipping or an inappropriate manner of whipping or too great frequency of whipping or the use of studded or overlong straps all constitute cruel and unusual punishment. But if whipping were to be authorized,

[11] From the evidence presented, we cannot say that the actual practice of corporal punishment in the Dade County school system as a whole violates the Eighth Amendment. However, we conclude that the plaintiffs' evidence as to the pattern, practice and usage of corporal punishment at Drew Junior High School was such that the trial court erred in dismissing Count Three under Rule 41(b), F.R. Civ. P., and also erred in dismissing Counts One and Two.

It is unclear whether the district court directly considered whether the pattern of punishment at Drew is violative of the Eighth Amendment. The district court found that "The instances of punishment which could be characterized as

how does one, or any court, ascertain the point which would distinguish the permissible from that which is cruel and unusual?"

" . . . we have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment: that the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess . . . ."

The problems of control suggested in *Jackson* must also exist to some extent in schools, although perhaps to a lesser degree. It is for this reason that we are especially concerned with the actual administration of corporal punishment in the Dade County schools. If we found that adequate controls did not exist, or could not be established, we would be forced to consider adopting the remedy used in *Jackson*, namely, an injunction against any use of corporal punishment. That result must ensue if the controls prove inadequate. It has been cogently argued that a total ban on this punishment is the only effective control:

"While theoretically corporal punishment need not be brutal, there is no assurance that it will be inflicted moderately or responsibly. In the heat of anger, especially if provoked by personal abuse, some teachers are likely to exceed legal bounds. Moreover, if limited corporal punishment were permitted, controls would be unlikely to prevent the really unmistakable kind of satisfaction which some teachers feel in applying the rattan." A total ban of this punishment would provide far more effective control."

<sup>21</sup> J. Kozol, *Death at an Early Age* 16-17 (1967).

<sup>22</sup> A rule forbidding all corporal punishment would probably receive more compliance than the common law principles because all parties involved are more likely to be aware of it and conscious of any violation. This would likely be reinforced by the added case of convicting a violator, simply by holding the school official involved in contempt of a court order, where injunctive relief is obtained."

6 Harv. Civ. Rights—Civ. Lib. L. Rev., *Corporal Punishment in the Public Schools*, p. 585.

severe, accepting the students' testimony as credible, took place in one junior high school." There is no doubt that this is a reference to Drew. In its conclusions of law, the district court declared that "Considering the system as a whole, there is no showing \* \* \* [of a violation of the Eighth Amendment]." At another point, the district court stated that "The evidence has not shown that corporal punishment in concept, or as authorized by the School Board, or as applied throughout the system, is arbitrary, capricious, unreasonable or wholly unrelated to the legitimate state purpose of determining its educational policy." Apparently the district court felt that a constitutional violation could be shown only by evidence sufficient to prove employment of cruel and unusual punishment throughout the entire Dade County school system.

[12] We think that such an approach would be incorrect. In our view, a violation of the Eighth Amendment can occur at the level of a single educational institution. The record in this case demonstrates that individual schools in Dade County have great independence in the development of a policy or system as to corporal punishment.<sup>27</sup> This makes it appropriate to examine whether the authorities at Drew imposed a system of punishment violative of the Eighth Amendment.<sup>28</sup>

From the evidence presented, it appears that Wright, the principal; Deliford, the assistant principal; and Barnes, an assistant to the principal, all agreed either explicitly or implicitly to impose a harsh regime upon the students at Drew. This is dramatically illustrated by their cooperation in administering corporal punishment to James Ingraham. It is further demonstrated by other instances where two or

<sup>27</sup> This is reflected by the system developed at Drew, as well as by the fact that at least sixteen schools have discontinued the use of corporal punishment.

<sup>28</sup> Eighth Amendment cases in analogous situations support this approach. In *Nelson v. Heyne*, 7 Cir. 1974, 491 F. 2d 352, the Seventh Circuit concluded that the district court did not err in deciding that disciplinary beatings at the Indiana Boys School constituted cruel and unusual punishment. This school had a population of about 400 juveniles. In *Wright v. McMann*, 2 Cir. 1967, 387 F. 2d 519, the Second Circuit held that the allegations that the punishments imposed at a particular New York State prison violated the Eighth Amendment should not have been dismissed.

all three administrators were present during paddlings, or were aware of paddlings after they occurred.<sup>29</sup> Considering the evidence as a whole, it would be incredible to find that any one of these three individuals was unaware of the punishment policy pursued by the other two. Thus, the regime at Drew Junior High School was in fact a system of punishment established and imposed by those in authority.

[13] The injuries sustained by various students at Drew demonstrate that the punishment meted out at this school was often severe, and of a nature likely to cause serious physical and psychological damage.<sup>30</sup> The evidence of paddlings for relatively minor offenses, sometimes without any opportunity for the student to explain what happened, show that the punishment was sometimes arbitrary. The frequency of the use of corporal punishment suggests real oppressiveness.

[14] Whether punishment is cruel and unusual in a constitutional sense depends to a significant degree upon the circumstances surrounding the particular punishment. *O'Neil v. Vermont*, 1892, 144 U.S. 323, 337, 12 S. Ct. 693, 36 L. Ed. 450 (Field, J., dissenting); *Robinson v. California*, *supra*; *Furman v. Georgia*, *supra*.<sup>31</sup>

<sup>29</sup> For example, after Roosevelt Andrews was paddled by Barnes in a bathroom, he complained to Wright while Deliford was also present, and his father later complained to Barnes, Deliford and Wright. On a later occasion, Wright paddled Andrews and allegedly hit him on the wrist while Deliford and Barnes were present. Reginald Bloom testified that Deliford, Wright and Barnes manhandled and struck a boy suspected of fighting. Ray Jones testified that Deliford and Barnes were both present when he and another student received fifty licks each, and that the two administrators took turns giving the licks. Larry Jones testified that Deliford and Barnes were both present when he received "two knots on my head."

<sup>30</sup> The district court stated in the order of dismissal that, "After having heard the testimony in this case, this Court believes that corporal punishment may be administered in such a way that the resultant psychological harm to some students will be substantial and lasting."

<sup>31</sup> In *O'Neil v. Vermont*, Justice Field in dissent opined that while the Eighth Amendment was usually applied to punishments which inflicted torture, and which were attended with acute pain and suffering, it had a wider applicability:

"The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged. The whole

(Continued)



In the present case, children aged twelve through fifteen were punished for alleged misconduct at school. In most instances, this misconduct did not involve physical harm to any other individual or damage to property. Some students claim they never engaged in misconduct at all, but were not given an adequate opportunity to show their innocence or were ignored when they attempted to explain why they did not deserve punishment.

The system of punishment utilized at Drew resulted in a number of relatively serious injuries, and thus clearly involved a significant risk of physical damage to the child. Corporal punishment also creates a risk of psychological damage. Dr. Scott Kester, an assistant professor of educational psychology at the University of Miami, testified that corporal punishment could damage a child's development by engendering anxiety, frustration, and hostility, or by causing sheer pathological withdrawal or hatred of the school environment. He further commented that since children model their behavior after adults, a child who is corporally punished may learn from this that physical force is an appropriate way in which to handle conflicts. Dr. Kester emphasized that the child who is corporally punished often becomes more aggressive and more hostile than he was prior to his punishment.

The evidence shows that corporal punishment is only one of a variety of measures available to school officials to pun-

(Continued)

inhibition is against that which is excessive \* \* \*." 144 U.S. 339-340. 12 S. Ct. 699.

Justice Marshall in *Furman v. Georgia*, 408 U.S. at 324-327, 92 S. Ct. 2726, argues persuasively that Justice Field's approach was adopted by the Court in later cases, including *Howard v. Fleming*, 1903, 191 U.S. 126, 24 S. Ct. 49, 48 L. Ed. 121; *Weems v. United States*, 1910, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 798, *Louisiana ex rel. Francis v. Resweber*, 1947, 329 U.S. 459, 67 S. Ct. 374, 91 L. Ed. 422, and *Trop v. Dulles*, 1958, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630. In *Robinson v. California*, 1962, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758, the Court held that a statute which made addiction to narcotics a misdemeanor inflicted a cruel and unusual punishment. The Court stated that the penalty provided by the statute—ninety days—was not, in the abstract, cruel and unusual. However, the Court classified narcotics addiction as an illness, and noted that, "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." 370 U.S. 667, 82 S. Ct. 1421.

ish students and to correct behavior. As found by the district court, "alternative measures in use range from parent and student conferences, the use of guidance counselors and psychologists, where available, to suspension and expulsion."<sup>22</sup>

Taking into consideration the age of the individuals, the nature of misconduct involved, the risk of physical and psychological damage, and the availability of alternative disciplinary measures, we conclude that the system of punishment at Drew was "excessive" in a constitutional sense. The severity of the paddlings and the system of paddling at Drew, generally, violated the Eighth Amendment requirement that punishment not be greatly disproportionate to the offenses charged. Our review of the evidence has further convinced us that the punishment administered at Drew was degrading to the children at that institution.

[15] Our result is not inconsistent with *Ware v. Estes*, *supra*, and other cases involving corporal punishment of children. In the *Ware* case, there was evidence of abuse by some of the teachers in the Dallas school district, but there is no indication that the system of punishment in the school system as a whole, or in any particular school, approached the severity and arbitrariness of the system developed at

<sup>22</sup> In 1972 a Task Force of the National Education Association suggested a number of alternatives to the use of corporal punishment and proposed a "Model Law Outlawing Corporal Punishment":

#### "Corporal Punishment of Pupils

"No person employed or engaged by any educational system within this state, whether public or private, shall inflict or cause to be inflicted corporal punishment or bodily pain upon a pupil attending any school or institution within such education system; provided, however, that any such person may, within the scope of his employment, use and apply such amounts of physical restraint as may be reasonable and necessary:

- "(1) to protect himself, the pupil or others from physical injury;
- "(2) to obtain possession of a weapon or other dangerous object upon the person or within the control of a pupil;
- "(3) to protect property from serious harm; and such physical restraint shall not be construed to constitute corporal punishment or bodily pain within the meaning and intent of this section. Every resolution, bylaw, rule, ordinance, or other act or authority permitting or authorizing corporal punishment or bodily pain to be inflicted upon a pupil attending a school or educational institution shall be void."

See Report of The Task Force on Corporal Punishment, National Education Association, p. 29-A.

Drew. Also, the court in *Ware* noted that in one case where a student was severely injured, the assistant principal responsible for the injury was suspended from his duties for several months. There is no indication from the record in this case that any efforts were made in the relevant time period to control or to moderate the system of punishment established by Wright, Deliford and Barnes.<sup>33</sup>

In *Nelson v. Heyne*, 7 Cir. 1974, 491 F. 2d 352, 354 n. 4, the Seventh Circuit states that, "The law appears to be well settled in both state and federal jurisdictions that school officials do not violate 8th Amendment proscriptions against cruel and unusual punishment *where the punishment is reasonable and moderate.*" (Emphasis added.) In the *Nelson* case, the court agreed with the district court's conclusion that paddlings administered by guards at the Indiana Boys School violated the Eighth Amendment. The relevant facts in that case, as described by the Seventh Circuit panel, are comparable to the facts developed in the district court with regard to Drew.

Since the plaintiffs' evidence makes a prima facie case of violation of the Eighth Amendment at Drew Junior High School, the dismissal of Count Three of the complaint must be reversed and remanded to the district court for further proceedings. While the defendants must, of course, be afforded an opportunity to offer evidence, the district court may find no reason to require the plaintiffs to offer their evidence a second time. It may proceed with the case as though defendants' motion for dismissal had been denied.

<sup>33</sup> Superintendent Whigham testified that he believed there was "an inquiry or objection to that incident [Ingraham paddling of October 6, 1970] by the area office" (Tr. 103). However, Earl Wells, a school district director and administrator, who investigated the Ingraham paddling, testified that as a result of his investigation, "I formulated an opinion that Mr. Wright had a right to paddle the child" (Tr. 234). When asked whether he had formulated an opinion as to whether or not Mr. Wright acted appropriately concerning the paddling of Ingraham, Wells replied, "I think he did" (Tr. 234). Wells explained that he formulated his opinion on the basis of Wright's intent, but admitted that he did not know whether Ingraham had resisted the paddling, and did not find out how many licks Ingraham had received (Tr. 235). We note that specific intent to deprive a person of his constitutional rights is not necessary to maintain a civil rights action. *Monroe v. Pape*, 1961, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492; *Pierson v. Ray*, 1967, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288; *Whirl v. Kern*, 5 Cir. 1969, 407 F. 2d 781 and cases cited therein.

See *Federal Deposit Insurance Corp. v. Mason*, 3 Cir. 1940, 115 F. 2d 548; *Gulbenkian v. Gulbenkian*, 2 Cir. 1945, 147 F. 2d 173; 5 Moore ¶41.13[2].

The dismissal of Counts One and Two must be reversed and remanded for further proceedings consistent with this opinion. Our examination of the record convinces us that there was sufficient evidence produced by James Ingraham and Roosevelt Andrews to avoid a directed verdict. There was evidence of a system of punishment violative of the Eighth Amendment. There was further evidence from which a jury might conclude that Ingraham and Andrews were victims of this system. Ingraham's description of how he was punished, and the medical evidence concerning the extent of his injuries, would justify sending his case to the jury. Andrews' description of Barnes' alleged assault upon him in the bathroom, and his description of his paddling by Wright in which his wrist was injured, are enough to avoid a directed verdict. On remand, the district court may allow the joinder of whatever state claims the plaintiffs may have, in accordance with the rules concerning pendent jurisdiction. See *United Mine Workers v. Gibbs*, 1966, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218.<sup>34</sup>

<sup>34</sup> Counsel for defendants almost conceded as much upon oral argument when in response to an inquiry he stated:

"Your Honor. The class action count was an equitable matter that was tried to the court. When the evidence was finished on that, we had a conference, and it was agreed between the court and the counsel that Mr. Feinberg could present any additional evidence that he wanted to present on the two individual damage counts, then the court would take under advisement my motion for directed verdict on those two counts. Now, he ruled on those two counts that the punishment of Ingraham and the punishment of Andrews didn't rise to constitutional proportions. Ingraham got 20 licks, he had bruises, painful bruises; Andrews had 2 or 3 lickings, of no more than 5 licks each; and the judge simply decided that there was—that these didn't meet any of the four principles of Justice Brennan to rise to the dignity of cruel and unusual punishment, even taking all the evidence and construing it most favorably to the plaintiffs. Now, he said then that if he had been tried for those two counts before a jury, and we had a right to a jury trial and had demanded it on those—if he had been trying those before a jury, had found no federal deprivation, he could still under the pendent jurisdiction theory have allowed it to go to the jury for damages in tort. However, in this case there would be no saving of judicial time and labor because we would have to go back and have a new jury trial all over again in order to get to that point, so he dismissed all three."



[16] Assuming that Counts One and Two continue to be for jury trial and unless otherwise stipulated, the issues of fact common to the actions at law and the suit in equity must first be heard and determined by a jury's verdict rendered on one or both of Counts One and Two. *Beacon Theatres v. Westover*, 1959, 359 U.S. 500, 79 S. Ct. 948, 3 L. Ed. 2d 988; *Dairy Queen v. Wood*, 1962, 369 U.S. 469, 473, 82 S. Ct. 894, 8 L. Ed. 2d 44; *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 5 Cir. 1961, 294 F. 2d 486; *Wright & Miller*, Federal Practice and Procedure: Civil § 2338.

[17] The complaint is somewhat unclear as to whether the plaintiffs allege that Superintendent Whigham is liable for damages for the paddlings to Ingraham and Andrews. Paragraph 11 of the Complaint states that, "Upon information and belief, the defendant Whigham and/or his agents and employees in the administrative hierarchy of the Dade County school system have knowingly lent their tacit or explicit support and approval to the methods of discipline and behaviorial control described herein." Yet neither the "First Cause of Action," relating to Ingraham, nor the "Second Cause of Action," relating to Andrews, mentions Whigham. Possibly the plaintiffs mean to hold Whigham responsible in damages on the basis of a negligence theory along the lines suggested in *Roberts v. Williams*, 5 Cir. 1972, 456 F. 2d 819, 827, modified, 456 F. 2d 834. Although we think this matter should be clarified and dealt with initially by the district court, we note that there is some question whether the Eighth Amendment extends to include negligence.<sup>35</sup>

#### IV

#### DUE PROCESS

Plaintiffs allege that corporal punishment as administered in Dade County deprives students of due process of law in

<sup>35</sup> *Roberts v. Williams*, 5 Cir. 1972, 456 F. 2d 819, 834 (Simpson, J., specially concurring); *Anderson v. Nasser*, 5 Cir. 1972, 456 F. 2d 835 (*en banc*), 842 (Simpson J., concurring specially and joined by Gewin, Coleman, Dyer, Morgan, Clark, Ingraham and Roney, JJ.); *Parker v. McKeithen*, 5 Cir. 1974, 488 F. 2d 553, 556 n. 6.

violation of the Fourteenth Amendment. They claim that students are provided no procedural safeguards before corporal punishment is imposed. They further claim that corporal punishment violates due process because it is arbitrary, capricious and unrelated to the achievement of any legitimate educational purpose.

A. Policy 5144, as revised effective August 5, 1970, provides the following procedural provisions:

If it appears that corporal punishment is likely to become necessary, the teacher must confer with the principal. The principal will determine the necessity for corporal punishment and designate the time, place and the person to administer said punishment. In any case, the student should understand clearly the seriousness of the offense and the reason for the punishment. Care should be taken that the period of time between the offense and the punishment is not so long as to cause undue anxiety in the pupil.

The revision effective November 3, 1971 retains the substance of these provisions, with a few additions. Under the revision, the principal may designate an individual with whom the teacher must consult and who may direct the administration of corporal punishment. Also, the principal must maintain a log of all instances where corporal punishment is administered.

Plaintiffs in this case argue that if corporal punishment is not *per se* unconstitutional, still a child has a constitutional right to be free from unwarranted punishment. In reliance upon *Dixon v. Alabama*, 5 Cir. 1961, 294 F. 2d 150, and later cases, the plaintiffs claim that corporal punishment in Dade County is administered without adequate procedural safeguards. The defendants apparently concede that corporal punishment in Dade County is a relatively serious punishment. In their brief they state that "Corporal punishment in the public schools of Dade County, Florida, is a last resort means of discipline as an alternative to suspension or expulsion \* \* \* ." (Defendants' Brief, p. 17.) Defendants state that a list of infractions for which corporal punishment would be administered would remove a "judgment aspect" otherwise applicable as to whether such punishment should be administered to a particular student. Defendants further

say that a formal hearing would not be desirable because it would lengthen the time before punishment, and lead to undue anxiety on the part of the student involved.

The district court found that, "There is no published schedule of infractions for which corporal punishment is authorized, nor any formal procedural requirements which must be observed before punishment may be administered." In its conclusions of law, the district courts stated that,

The concept of due process is premised upon fairness and reasonableness in light of the totality of the circumstances then existing. The due process limitation does not unduly confine officials who have the responsibility of governing. Whether the constitution requires that a particular right obtain in a specific proceeding depend upon a complexity of factors.

It seems to this Court that if there is any good purpose to be served by corporal punishment in the schools, such purpose would be long since passed if formal notice and hearing were required before a paddling. There has been no deprivation of "due process."

[18] We agree with the district court that the full panoply of procedures associated with the judicial process are not required in determining whether to administer corporal punishment. At the same time, due process demands that the procedures followed by school officials comport with fundamental fairness. See *Hannah v. Larche*, 1960, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307.

The approach outlined in *Whatley v. Pike County Board of Education*, N.D. Ga. 1971, No. 977 (unreported, three-judge district court) suggests an appropriate resolution of the due process question. In a case involving an eleven-year-old pupil, the court said:

Where, as here, the pupil was to be promptly corrected for his transgressions, and long-term consequences stemmed only from his refusal to accept his punishment, the flexible elements of due process require only that the student know and understand the rule under which he is to be punished, and that in cases where there is doubt as to the actual offender, further inquiry be made by the school officials concerned.

If a student must "know and understand" the rule under which he is to be punished, then clearly the school authorities must tell him before he is punished precisely what he has done which merits punishment. If the student concedes that he has engaged in misconduct, then all that remains is to determine whether corporal punishment is appropriate, and to determine the details of its administration. In Dade County, under Policy 5144, the principal or his administrative designee is responsible for making these decisions. Thus, these decisions are usually made by someone who was not directly involved in the circumstances surrounding the alleged misconduct.

[19, 20] If the student concedes that he has engaged in certain conduct, but claims that he did not know that such conduct was prohibited, the school authorities should proceed with caution. Inquiry should be made to determine whether the student knew or should have known that his conduct violated school rules or policies. Punishment of any sort would be patently unfair where the student was genuinely unaware of a school regulation, and had no reason to know that he was engaging in conduct which might later be used as a basis for punishment. Cf. *St. Ann et al. v. Palisi et al.*, 5 Cir. 1974, 495 F. 2d 423. The publishing of written rules of conduct would obviously eliminate many problems which might arise in this area.

[21-23] If the student claims that he is innocent of the conduct which merits punishment, school officials should make sufficient inquiries to insure that, to the contrary, the student is guilty beyond any reasonable doubt. After all, once the student is corporally punished, no retraction of punishment is possible. This means that eyewitnesses should be questioned by the principal or his designee and the student should be allowed to call witnesses in his own behalf. Also, the student should be allowed to respond to the witnesses against him, and in some cases he should be accorded an opportunity to ask them relevant questions. Of course, all of this may take place in an informal setting, and no formal rules of procedure or evidence need be followed.

[24] Examining the procedures prescribed under Policy 5144, we find them not inconsistent with the procedures we have outlined. In implementing Policy 5144, most principals



probably already follow the procedural guidelines we have suggested. Of course, the testimony of students from Drew indicates that this has not uniformly been the case.<sup>36</sup>

B. Plaintiffs urge that corporal punishment is unrelated to the achievement of any legitimate educational purpose. The testimony of Dr. Kester supports this claim to some extent. Dr. Kester stated that he could think of "no reputable authority who recommends corporal punishment" (Tr. 737), and that he could not think of "a renowned or leading authority in psychology, educational psychology, educational research, psychiatry, who advocates corporal punishment in the public schools or in the schools" (Tr. 756). He modified his position somewhat by stating that he could think of no reputable authority who recommended corporal punishment to suppress behavior "without immediately following it as soon as possible with a positive reinforcement of acceptable behavior." Dr. Kester also conceded that there might be some authorities who favored corporal punishment,<sup>37</sup> and that "some may say that it accomplishes the thing that I have already said that it accomplished: that you can terminate an unwanted behavior if you are willing to bear the consequences, however negative they may be" (Tr. 756). Also, counsel for plaintiffs stated that he did not propose to establish that there is not a shred of psychological or educational justification for corporal punishment.

[25, 26] In light of the concessions by plaintiffs' expert and plaintiffs' counsel, and in light of other cases involving corporal punishment where there apparently was evidence of the utility of corporal punishment,<sup>38</sup> we are unwilling

<sup>36</sup> We are particularly disturbed by the testimony that whole classes of students were corporally punished for the misconduct of a few. A number of students claimed that physical education teachers in particular would occasionally give everyone in the class one or two swats when the class was noisy, or when something was stolen. (Tr. 429-31, 591, 637-8, 647, 809-811, 873, 878.) Cf. *St. Ann et al. v. Palisi et al.*, 5 Cir. 1974, 495 F. 2d 423.

<sup>37</sup> "As I said before, sir, I have not read of someone I consider to be an authority, a leading authority in the field, in fact I can't remember an instance, although I'm sure there is somebody who writes something somewhere who could get it in print—you can get almost anything in print—who said that corporal punishment is a good thing." (Tr. 755-756.)

<sup>38</sup> See *Ware v. Estes*, *supra*, 323 F. Supp. at 659; *Glaser v. Marietta*, *supra*, 351 F. Supp. at 557.

to say that mild or moderate corporal punishment is unrelated to the achievement of any legitimate educational purpose. However, in this case the severe punishment meted out at Drew went beyond legitimate bounds.

In *Dixon v. Alabama*, 5 Cir. 1961, 294 F. 2d 150, 157, this Court stated:

Turning then to the nature of the governmental power to expel the plaintiffs, it must be conceded \* \* \* that that power is not unlimited and cannot be arbitrarily exercised. Admittedly, there must be some reasonable and constitutional ground for expulsion or the courts would have a duty to require reinstatement.

In a recent case, this language was explained as follows:

This passage and the constitutional provision it elaborates do not license federal courts to review and revise school board disciplinary actions at will. Application is limited to the rare case where there is shocking disparity between offense and penalty.

*Lee v. Macon County Board of Education*, 5 Cir. 1974, 490 F. 2d 458, 460 n. 3. In the present case, as regards Drew Junior High School, there exists "a shocking disparity" between the offenses committed by various of the students and the harsh punishment imposed by school officials. Thus, we conclude that the system of punishment at Drew not only violated the constitutional prohibition against cruel and unusual punishment, but also violated due process. Cf. *Anderson v. Nosser*, 5 Cir. 1972, 456 F. 2d 835 (*en banc*); *St. Ann et al. v. Palisi et al.*, *supra*.

## V

### RIGHT OF THE PARENT AND CHILD TO PROHIBIT CORPORAL PUNISHMENT BY SCHOOL OFFICIALS

[27] Paragraph 17 of the complaint alleges that following a beating administered to Roosevelt Andrews, Roosevelt's father instructed school officials to refrain from assaulting, beating or otherwise physically injuring his son. Paragraph 18 of the complaint alleges that despite these instructions, Roosevelt was later paddled by school officials. Paragraph 22 of the complaint alleges that corporal punishment abridges a

student's right to physical integrity, dignity of personality, and freedom from arbitrary authority in violation of the Fourth, Ninth and Fourteenth Amendments. At trial, Phyllis Straus, the mother of four children who attend Dade County schools, testified that despite her explicit directions, her children had been corporally punished. A number of children, including James Ingraham, testified that they had refused to accept corporal punishment, but were paddled anyway. In our view, the plaintiffs clearly raised the issue of whether school officials may properly administer corporal punishment if the parent or child has objected to its administration.

In *Ware v. Estes*, N.D. Tex. 1971, 328 F. Supp. 657, the district court dismissed an action where the plaintiffs alleged in part that the defendants administered corporal punishment without the prior permission of the parent or student in violation of the Fourteenth Amendment. The district court's reasoning is revealed by the following portion of its opinion:

Under the doctrine of *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042 (1922), the state cannot unreasonably interfere with the liberty of parents and guardians to direct the upbringing and education of children under their control. These parental rights are not beyond limitation. *Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645, 652 (1943). In order for a deprivation of due process under the fourteenth Amendment, to occur, the rules and policies of the school district must bear 'no reasonably relation to some purpose within the competency of the State.' *Pierce v. Society of Sisters*, 268 U.S. 510, 535, 45 S. Ct. 571, 573, 69 L. Ed. 1070, 1076 (1924).

According to the testimony, it cannot be said that the Dallas Independent School District's policy on the use of corporal punishment bears no reasonable relation to some purpose within the competency of the state in its educational function.

328 F. Supp. at 658-659. On appeal, this Court simply stated the following: "We are in agreement with the well-considered memorandum opinion of the district court \* \* \*

and its judgment is affirmed." *Ware v. Estes*, 5 Cir. 1972, 458, F. 2d 1360.<sup>39</sup>

The result in *Ware* depends to some extent upon the particular circumstances revealed by the evidence in that case. In the present case, the school authorities have presented no evidence, and so have had no opportunity to demonstrate the extent to which corporal punishment is a useful or necessary disciplinary measure in Dade County.<sup>40</sup> In any event, the approach taken on this issue by the district court in *Ware* deserves re-examination in light of certain recent Supreme Court cases which touch on the relationship of parent and child, and the right of privacy. These cases include *Stanley v. Illinois*, 1972, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551; *Wisconsin v. Yoder*, 1972, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15; *Roe v. Wade*, 1973, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147. It is not appropriate at the present time to attempt to resolve this issue. Instead, we suggest that, upon remand, the district court make findings of fact and conclusions of law on this aspect of the case.

The judgments of dismissal of each of the counts of the complaint are reversed and the cases are remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

LEWIS R. MORGAN, Circuit Judge, dissents.

LEWIS R. MORGAN, Circuit Judge (dissenting):

I respectfully dissent from the holdings of the majority. I feel that the majority opinion is in conflict with our holding in *Ware v. Estes*, N.D. Texas. 1971, 328 F. Supp. 657, aff'd 5 Cir. 1972, 458 F. 2d 1360, cert. den., 409 U.S. 1027, 93 E. Ct. 463, 34 L. Ed. 2d 321. The familiar section of the Civil Rights Act under which these actions are founded, 42 U.S.C. § 1983, provides that a person acting under color of

<sup>39</sup> In *Whitley v. Pike County Board of Education*, D. Ga. 1971 (unreported, three-judge district court), the court disagreed with plaintiff's argument that "the sanctity of the family relationship, the so-called right of privacy, and the right to physical integrity or dignity of personality" were violated by the Georgia statute authorizing corporal punishment. It is somewhat unclear exactly what the plaintiff in this case argued.

<sup>40</sup> It is by no means certain that corporal punishment is of the same importance in every community. See, for example, *Glaser v. Marietta*, *supra*.



state law who deprives another of rights, privileges, or immunities secured by the Constitution shall be liable to the injured party in an action at law or suit in equity. It is, of course, essential to recovery in cases under Section 1983 that the plaintiff establish an invasion of federally protected constitutional rights; otherwise, there is no federal jurisdiction. *Rosenberg v. Martin*, 2 Cir. 1973, 478 F. 2d 520. However, in a school system such as the Dade County System, with approximately 12,500 teachers and administrative personnel, a student population in excess of 242,000 pupils, and 237 schools, a disciplinary event in one school, Drew Junior High School, cannot give rise to a constitutional question and a right to have the federal courts intervene. For this reason, I would affirm the judgment of the district court which dismissed the actions.

EN BANC OPINION

United States Court of Appeals, Fifth Circuit

No. 73-2078.

ELOISE INGRAHAM, AS NEXT FRIEND, ETC., ET AL.,  
PLAINTIFFS-APPELLANTS

v.

WILLIE J. WRIGHT, I, INDIVIDUALLY, ETC., ET AL.,  
DEFENDANTS-APPELLEES

Jan. 8, 1976

Appeal from the United States District Court for the  
Southern District of Florida.

Before BROWN, Chief Judge, RIVES, GEWIN, BELL,  
THORNBERRY, COLEMAN, GOLDBERG, AINS-  
WORTH, GODBOLD, DYER, SIMPSON, MORGAN,  
CLARK, RONEY and GEE, Circuit Judges

LEWIS R. MORGAN, Circuit Judge:

Plaintiffs James Ingraham and Roosevelt Andrews, two junior high school students in Dade County, Florida, filed a complaint containing three counts on January 7, 1971.

Counts one and two were individual actions for compensatory and punitive damages brought under 42 U.S.C. §§ 1981-88, with jurisdiction claimed under 28 U.S.C. § 1331 and § 1343. Plaintiffs claimed that personal injuries resulted from corporal punishment administered by certain defendants in alleged violation of their constitutional rights, in particular their right to freedom from cruel and unusual punishment. Specifically, plaintiff Ingraham alleges in count one that on October 6, 1970, defendants Principal Wright and Assistant Principals Deliford and Barnes struck plaintiff repeatedly with a wooden instrument, injuring plaintiff and causing him to incur medical expenses. Plaintiff testified that this paddling was precipitated by his and several other children's disruption of a class over the objection of the teacher. Defendant Wright removed plaintiff and the other disruptive students to his office whereupon he paddled eight to ten of them. Wright had initially threatened plaintiff with five blows, but when the latter refused to assume a paddling position, Wright called on defendants Deliford and Barnes who held plaintiff in a prone position while Wright administered twenty blows. Plaintiff complained to his mother of discomfort following the paddling, whereupon he was taken to a hospital for treatment. Plaintiff introduced evidence that he had suffered a painful bruise that required the prescription of cold compresses, a laxative, sleeping and pain-killing pills and ten days of rest at home and that prevented him from sitting comfortably for three weeks.

Plaintiff Andrews alleges two incidents of corporal punishment as the basis for his claim for damages in count two of the complaint. Plaintiff alleges that on October 1, 1970, he, along with fifteen other boys, was spanked in the boys' restroom by Assistant Principal Barnes. Plaintiff testified that he was taken by a teacher to Barnes for the offense of tardiness, but that he refused to submit to a paddling because, as he explained to Barnes, he had two minutes remaining to get to class when he was seized and was not, therefore, guilty of tardiness. Barnes rejected plaintiff's explanation and, when plaintiff resisted punishment, struck him on the arm, back, and across the neck.

Plaintiff Andrews was again spanked on October 20, 1970. Despite denials of guilt, plaintiff was paddled on the back-

side and on the wrist by defendant Wright in the presence of defendants Deliford and Barnes for having allegedly broken some glass in sheet metal class. As a result of this paddling, plaintiff visited a doctor and received pain pills for the discomfort, which lasted approximately a week.

Count three is a class action brought by plaintiffs Ingraham and Andrews as representatives of the class of students of the Dade County school system who are subject to the corporal punishment policies issued by defendant members of the Dade County School Board. This count seeks final injunctive and/or declaratory relief against the use of corporal punishment in the Dade County School System and can be divided into three constitutional arguments. First plaintiffs claim that infliction of corporal punishment on its face and as applied in the present case constitutes cruel and unusual punishment in that its application is grossly disproportionate to any misconduct in which plaintiffs may have engaged. Second, plaintiffs claim that because it is arbitrary, capricious and unrelated to achieving any legitimate educational goal, corporal punishment deprives all students of liberty without due process of law in violation of the Fourteenth Amendment. Plaintiffs also allege that the failure of defendants to promulgate a list of school regulations and corresponding punishments increases the capriciousness of the punishment. Finally, plaintiffs claim that defendants' failure to provide any procedural safeguards before inflicting corporal punishment on students, including adequate notice of alleged misconduct, hearing, examination and cross-examination, representation and notice of rights, constitutes summary punishment and deprives students of liberty without due process of law in violation of the Fourteenth Amendment.

Plaintiffs presented their evidence in count three of the complaint in a week-long trial before the district court without a jury. At the close of plaintiffs' case, defendants moved for dismissal under Rule 41(b), F.R. Civ. P. which provides in part:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not

granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

By agreement of the parties the court considered the evidence offered to support count three as having been offered on counts one and two and as if upon motion for directed verdict for these two counts. The district court then dismissed count three of the complaint and, concluding that a jury could not lawfully find that either of the plaintiffs sustained a deprivation of constitutional rights, likewise dismissed counts one and two.

#### I. JURISDICTION

[1, 2] Defendants assert that there is no federal jurisdiction over count three under 42 U.S.C. §§ 1981-1988 and 28 U.S.C. § 1331 and § 1343 because the Dade County School Board and the Superintendent of Schools, Edward L. Whigham, are not "persons" and hence are not amenable to suit. Defendants rely on *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S. Ct. 2222, 37 L. Ed. 2d 109 (1973), in which the Supreme Court held that a municipality was not a "person" within the meaning of § 1983. While it is well-settled that a school board is not a "person" and thus cannot be sued under § 1983, it is clear that a school superintendent is a "person" amenable to suit. *Sterzing v. Ford Bend Independent School District*, 496 F. 2d 92, at 93, n. 2 (5th Cir. 1974). We, therefore, hold that jurisdiction was improperly granted against the Dade County School Board and, accordingly, that part of the complaint must be dismissed.



Jurisdiction to proceed against Edward L. Whigham, Superintendent of Schools, was, however, properly granted.

## II. CRUEL AND UNUSUAL PUNISHMENT

[3] Plaintiff-appellants allege that the infliction of corporal punishment on public school children on its face, and as applied in the instant case, constitutes cruel and unusual punishment under the Eighth Amendment sufficient to entitle plaintiffs to damages and injunctive relief against the Dade County School Board under § 1983. We do not agree. It is the opinion of the majority of this court that the Eighth Amendment does not apply to the administration of discipline, through corporal punishment, to public school children by public school teachers and administrators.

[4] The Eighth Amendment states "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Not only the connotation of the words "bad," and "fine," but the legislative history<sup>1</sup> concerning enactment of the bill of rights supports an argument that the Eighth Amendment was intended to be applied only to punishment invoked as a sanction for criminal conduct.<sup>2</sup> Indeed, Supreme Court decisions which have in-

<sup>1</sup>The legislative history surrounding the enactment of the cruel and unusual clause indicates that it was intended to prevent the tortious and barbarous methods used in some European countries to extort confessions and to punish crimes. The following argument delivered in favor of the proposed "cruel and unusual clause" of the Bill of Rights indicates the intended limits of its scope:

"[Congress will] have to ascertain, point out, and determine, what kinds of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard of punishments and annexing them to crimes; and there is no constitutional check of them, but that racks and gibbets may be amongst the most mild instruments of their discipline."

Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Cal. L. Rev. 839 at 841 (1969), quoting from 2 J. Elliot, *The Debates in the Several State Conventions on the adoption of the Federal Constitution*, 111 (2d Ed. 1881). (Emphasis added).

<sup>2</sup>We are not persuaded by the majority's argument in the original panel decision that the Supreme Court decision in *Trop v. Dulles* requires a holding that the Eighth Amendment reaches the administration of corporal punishment in public schools:

"It was succinctly stated in Vol. 6 Harv. Civ. Rights—Civ. Lib. L. Rev., *Corporal Punishment in the Public Schools*, p. 585, n. 24: "In *Trop v. Dulles*,

terpreted the Amendment have focused on the inherent cruelty of penalties "inflicted by a judicial tribunal in accordance with law and retribution for criminal conduct." *Negrich v. Hohn*, 246 F. Supp. 173 (W.D. Pa. 1965), *affirmed on other grounds*, 379 F. 2d 213 (3rd Cir. 1967) (emphasis added). *E.g.*, *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) (death penalty as cruel and unusual punishment); *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962) (state's imprisonment of narcotics addict as cruel and unusual punishment); *Weems v. United States*, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1910) (disproportionate punishment of fifteen years to hard labor for conviction of strict liability offense as cruel and unusual punishment).

Although the Supreme Court has not yet discussed the applicability of the Eighth Amendment to corporal punishment administered in the public schools, a few lower courts have

356 U.S. 86, 94-100 [78 S. Ct. 590, 2 L. Ed. 2d 630] (1958), the Supreme Court, in applying the eighth amendment to all punishments inflicted pursuant to 'penal laws,' set forth two tests to determine the meaning of penal. First, there must be the imposition of a 'disability for the purpose of punishment.' *Id.* at 96 [78 S. Ct. 590]. Second, there must be the prescription of a 'consequence that will befall one who fails to abide by regulating provisions \* \* \*.' *Id.* at 97 [78 S. Ct. 598].

"Infliction of corporal punishment by public school personnel meets both tests." *Ingraham v. Wright*, 498 F. 2d 248, 259-60, n. 20 (5th Cir. 1974).

In *Trop v. Dulles*, the Supreme Court was addressing the constitutional propriety of § 401(g) of the Nationality Act of 1940 which provides for the loss of United States citizenship by a national who has deserted the military forces of the United States during a time of war and who has been convicted by court-martial. In setting up a "purpose" test to determine what is "penal" and what is thereby within the scope of the Eighth Amendment's prohibition against cruel and unusual punishment, the court was countering the government's argument that the statute was "non-penal" in that it provided for loss of citizenship as opposed to incarceration. 356 U.S. 96, 98-99, 78 S. Ct. 590, 2 L. Ed. 2d 630, 641.

Yet, the court in *Trop v. Dulles* was still addressing the imposition of an essentially criminal sanction. The court several times refers to the desertion for which defendant was losing his citizenship, as a "crime," e.g., 356 U.S. at 96, 78 S. Ct. 590, 2 L. Ed. 2d at 640. In addition, denationalization under 401(g) could occur only after conviction by court-martial under 10 U.S.C. § 885, enacted August 10, 1956. The loss of citizenship found to be reached by the Eighth Amendment in *Trop* contains elements of criminal sanctions imposed by a judicial tribunal which are strikingly absent in the application of discipline in the public schools.

considered the issue and divided on its resolution.<sup>3</sup> We concur with the approach taken by the two district courts that have held the Eighth Amendment to be inapplicable to corporal punishment in public schools. In *Sims v. Waln*, *supra*, the court dismissed an action for damages and injunctive relief arising out of facts similar to those present in the instant case, stating:

Regarding the Eighth Amendment claim there is an initial distinction that must be made between criminal penalties and civil penalties. The distinction must be made because the *Eighth Amendment is not applicable in a civil context*. Concerning the Cruel and Unusual Punishment clause of the Eighth Amendment the Supreme Court has stated that: "*the primary purpose of that clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes \* \* \**" *Powell v. Texas*, 392 U.S. 514, 531-32, 88 S. Ct. 2145, 2154, 20 L. Ed. 2d 1254 (1968). *Id.* at 549 (emphasis added).

Likewise, in *Gonyaw v. Gray*, *supra*, the district court of Vermont, in dismissing an action for damages and injunctive relief against a school board which imposed corporal punishment on its students, stated:

\* \* \* it is, of course, essential to recovery in both cases under § 1983 that the plaintiff establish an invasion of fed-

<sup>3</sup>Decisions discussing the applicability of the Eighth Amendment to corporal punishment administered in the public schools can be classified into three groups: (1) case holding that the Eighth Amendment does apply to corporal punishment in public schools—*Bramlett v. Wilson*, 495 F. 2d 714 (8th Cir. 1974); (2) cases holding that the Eighth Amendment does not apply to corporal punishment in public schools—*Sims v. Waln*, 388 F. Supp. 543 (S.D. Ohio 1974), and *Gonyaw v. Gray*, 361 F. Supp. 366 (D. Vt. 1973), and (3) cases that assume, without deciding, that the Eighth Amendment applies to imposition of corporal punishment in schools but in that instant case determine that punishment complained of was not severe enough to constitute cruel and unusual punishment—*Baker v. Owen* 395 F. Supp. 294 (M.D. N.C. 1975), *aff'd*—U.S.—, 96 S. Ct. 210, 46 L. Ed. 2d 137 (1975); *Glaser v. Marietta*, 351 F. Supp. 555 (W.D. Pa. 1972); *Ware v. Estes*, 328 F. Supp. 657 (N.D. Tex. 1971), *aff'd per curiam*, 458 F. 2d 1360 (5th Cir. 1972); *Whitley v. Pike County Board of Education*, C.A. 977 (N.D. Ga. 1971) (three judge court); and *Sims v. Board of Education*, 329 F. Supp. 678 (D. N.M. 1971).

erally protected constitutional rights \* \* \*. *Mere tortious conduct* does not constitute a deprivation of constitutional rights under this statute.

This statute [authorizing corporal punishment] does not offend the protection against cruel and unusual punishment since this amendment provides a limitation against penalties imposed for criminal behavior. \* \* \* Since neither plaintiff was punished for an offense which was criminal in nature, the Eighth Amendment does not proscribe the conduct assigned to the defendants. *Id.* at 368 (emphasis added.)<sup>4</sup>

In support of their argument that corporal punishment in a public school context is cruel and unusual punishment, appellants cite *Jackson v. Bishop*, 8 Cir. 1968, 404 F. 2d 571 in which the Eighth Circuit Court of Appeals enjoined the use of a strap in prisons. We do not find prisons and public schools to be analogous in the context of Eighth Amendment coverage. As discussed, *supra*, the function of the Eighth Amendment's prohibition against cruel and unusual punishments was intended to prevent the imposition of unduly harsh penalties for criminal conduct. It is not an unreasonable interpretation of the Eighth Amendment to include within its coverage discipline imposed upon persons incarcerated for criminal conduct, since such discipline is part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny. To extend the *Jackson* case from a prison context to a public school situation would, however, distort the intended scope of the Amendment.<sup>5</sup>

<sup>4</sup>The district court of Vermont has recently granted jurisdiction under 28 U.S.C. § 1343(3) to entertain a claim that administration of excessive corporal punishment violated the student-claimant's right to freedom from cruel and unusual punishment. *Roberts v. Way*, 398 F. Supp. 856 (D. Vt. 1975). The court distinguished *Roberts* from *Gonyaw v. Gray*, *supra*, in which less severe punishment was alleged. The extent of the holding, however, was merely a finding that the claim was not so wholly insubstantial or frivolous as to divest the court of jurisdiction; the applicability of the Eighth Amendment to severe corporal punishment was not reached.

<sup>5</sup>Even assuming that the Eighth Amendment was equally applicable to corporal punishment imposed by school authorities, we would not necessarily adopt the holding of the *Jackson* court that corporal punishment is per se

(Continued)



We do not mean to imply by our holding that we condone child abuse, either in the home or the schools. We abhor any exercise of discipline which could result in serious or permanent injury to the child. Indeed, if the force used by defendant teachers in disciplining plaintiff was as severe as plaintiffs allege, a Florida state court could find defendants civilly and criminally liable for tortious conduct exceeding the level of severity authorized by 232.27 of Fla. Stat. Ann. and by Dade County School Board policy 5144. The basis of such actions is, however, tort and criminal law, *not* federal constitutional law. We find it neither proper nor necessary to expand the Eighth Amendment beyond its intended and reasonable scope to encompass an action which is essentially based on the commission of a battery.

[5] In short, scrutiny of the propriety of physical force used by a school teacher upon his or her student should be the function of a state court, with its particular expertise in tort and criminal law questions; the administration of corporal punishment in public schools, whether or not excessively administered, does not come within the scope of Eighth Amendment protection. Because the plaintiffs do not allege facts which could support a finding that defendants have deprived them of their right to freedom from cruel and

(Continued)

cruel and unusual, since there are many practical differences between prisons and public schools that would tend to mitigate the use of such discipline in the latter institution. First, the *Jackson* court was concerned with the absence of safeguards necessary to prevent abuses in the imposition of corporal punishment by prison officials. The much greater access of school children through their parents to public opinion and to the political process, in addition to the natural restraint that generally exists when one strikes a child, deters excessive conduct by the school official administering corporal punishment. Also, central to the *Jackson* court's finding that use of a strap was cruel and unusual was its belief that such punishment, when imposed on prisoners, "offend[s] contemporary concepts of decency and human dignity." *Id.* at 579. While whipping an adult prisoner is sufficiently degrading to offend "contemporary concepts of decency," we cannot believe paddling a child, a long-accepted means of disciplining and inculcating concepts of obedience and responsibility, offends current notions of decency and human dignity. See also *Nelson v. Heyne*, 491 F. 2d 352 (7th Cir. 1974) in which the court held that paddling of juveniles in a correctional institute constituted cruel and unusual punishment, but that corporal punishment administered in public schools could be upheld. *Id.* at 356.

unusual punishment, neither the legal action for damages included in counts one and two nor the equitable action for injunctive relief set out in count three can lie.

### III. SUBSTANTIVE DUE PROCESS

Plaintiffs allege that "the infliction of corporal punishment on its face deprives all students as well as plaintiffs \* \* \* of 'liberty without due process of law' in violation of the Fourteenth Amendment to the United States Constitution since it is arbitrary, capricious, and unrelated to achieving any legitimate educational purpose." In essence, plaintiffs here allege a deprivation of their right to substantive due process, as this right to freedom from arbitrary governmental action has come to be known. We find this argument unpersuasive.

Statutory authority for the use of corporal punishment in Florida public schools is found by implication in § 232.27 of Fla. Stat. Ann. which provides:

Each teacher or other member of the staff of any school shall assume such authority for the control of pupils as may be assigned to him by the principal and shall keep good order in the classroom and in other places in which he is assigned to be in charge of pupils, *but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unnecessarily severe in its nature.* (Emphasis added.)

In addition the Dade County School Board Policy 5144, effective at the time plaintiff's cause of action arose, explicitly authorized corporal punishment, setting forth guidelines under which it was to be administered.<sup>6</sup>

<sup>6</sup> Policy 5144 provides in part:

#### "II. Punishment: Corporal Punishment

"Punishment in the general sense is the inflicting of a penalty for an offense. Corporal punishment is generally applied to the body of the offender or is physical punishment as opposed to other forms of punishment and is administered as a means of changing the behavior of the student. Therefore,

(Continued)

[6-9] After reviewing the record, we agree with the district court's finding that "the evidence has not shown that corporal punishment in concept, or as authorized by the school board, or as applied throughout the school system, is arbitrary, capricious, or wholly unrelated to the legitimate state purpose of determining its educational policy." The plaintiffs' right to substantive due process is

\* \* \* a guaranty against arbitrary legislation, demanding that the law not be unreasonable and that the means selected shall have a real and substantial relation to the object sought to be attained. The test is whether there be a matter touching the public interest which merits instant correction at the hands of the authorities and, if so, that the remedy adopted by the rule-making authorities be reasonably calcu-

(Continued)

it is important to analyze whether or not this goal will be accomplished by such action.

"Corporal punishment may be used in the case where other means of seeking cooperation from the student have failed. If it appears that corporal punishment is likely to become necessary, the teacher must confer with the principal. The principal will determine the necessity for corporal punishment and designate the time, place, and the person to administer said punishment. In any case, the student should understand clearly the seriousness of the offense and the reason for the punishment. Care should be taken that the period of time between the offense and the punishment is not so long as to cause undue anxiety in the pupil. The punishment must be administered in kindness and in the presence of another adult, at a time and under conditions not calculated to hold the student up to ridicule or shame.

"In the administering of corporal punishment, no instrument shall be used that will produce physical injury to the student, and no part of the body above the waist or below the knees may be struck. The person administering the corporal punishment must realize his own personal liabilities if the student being given corporal punishment is physically injured.

"Corporal punishment should never be administered to a student whom school personnel know to be under psychological or medical treatment unless there has been a preconference with the school psychologist or the physician."

Policy 5144 was revised extensively, effective November 3, 1971, almost ten months after this action was filed. The revision sets a maximal limit on the number of strokes which can be applied (five for elementary school children and seven for junior and senior high school children), requires punishment to be administered "posteriorly" and in no case about the head and shoulders, emphasizes consideration of the seriousness of the offense in determining the proper punishment, and requires a recording of the infraction which justified the punishment.

lated to correct it. *Sims v. Board of Education*, *supra*, at 684.

Certainly, maintenance of discipline and order in public schools is a prerequisite to establishing the most effective learning atmosphere and as such is a proper object for state and school board regulation.<sup>7</sup> Without the existence of disciplinary sanctions for misbehavior, students who desire to learn would be deprived of their right to an education by the more disruptive members of their class. We are unwilling to hold that corporal punishment, as one of the means used to achieve an atmosphere which facilitates the effective transmittal of knowledge, has no "real and substantial relation to the object sought to be attained."

[10] Certainly the guidelines set down in Policy 5144 establish standards which tend to eliminate arbitrary or capricious elements in any decision to punish. Having determined that corporal punishment itself and corporal punishment as circumscribed by the guidelines in Policy 5144 is not arbitrary, capricious, or unrelated to legitimate educational goals, we refused to look at each individual instance of punishment to determine if it has been administered arbitrarily or capriciously. We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child.<sup>8</sup>

We emphasize that it is not this court's duty to judge the wisdom of particular school regulations governing mat-

<sup>7</sup> See *Sims v. Waln*, 388 F. Supp. 543 (S.D. Ohio 1975), in which the court stated:

"A teacher is responsible for the discipline in his school, and for the progress, conduct, and deportment of his pupils. It is his duty to maintain good order and to require of his pupils a faithful performance of their duties. To enable him to discharge such a duty effectively, he must have the power to enforce prompt obedience to his lawful commands. For this reason, in proper cases, he may inflict corporal punishment on refractory pupils." *Id.* at 546.

<sup>8</sup> Indeed, Policy 5144, as effective during 1970-71, provides in part: "The person administering the corporal punishment must realize his own personal liabilities if the student being given corporal punishment is physically injured."



ters of internal discipline. Only if the regulation bears no reasonable relation to the legitimate end of maintaining an atmosphere conducive to learning can it be held to violate the substantive provision of the due process laws. Paddling of recalcitrant children has long been an accepted method of promoting good behavior and instilling notions of responsibility and decorum into the mischievous heads of school children. We do not here overrule it.

#### IV. PROCEDURAL DUE PROCESS

Plaintiffs also allege as part of their claim for injunctive and declaratory relief that defendants have deprived the class which plaintiffs represent of its right to procedural due process. Plaintiffs argue that procedural due process requires (1) that a schedule of school regulations and punishments to be accorded for their breach be established; (2) that notice be given to the student of the offense for which he is to be punished, and (3) that a hearing with opportunity for examination and cross-examination and with a right to counsel be accorded before punishment is inflicted.

[11, 12] The concept of due process is premised upon fairness and reasonableness in light of the totality of circumstances. *Hannah v. Larcht*, 363 U.S. 420, 80 S. Ct. 1502, 4 L. Ed. 2d 1307 (1960); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1951). "[W]hether any protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'" *Joint Anti-Fascist Refugee Committee v. McGrath*, *supra*, at 168, 71 S. Ct. at 646 (Frankfurter, J., concurring), quoted in *Morrissey v. Brewer*, 408 U.S. 471, at 481, 92 S. Ct. 2593, at 2600, 33 L. Ed. 2d 484 (1972) (emphasis added). We do not believe that infliction of a paddling subjects a schoolchild to a grievous loss for which Fourteenth Amendment due process standards should be applied.

[13] In its argument for procedural safeguards, the dissent relies on *Baker v. Owen*, *supra*, a three-judge district court judgment summarily affirmed by the Supreme Court. In *Baker*, the three-judge district court upheld a North Carolina statute authorizing corporal punishment against

plaintiffs' argument that the constitutional concept of familial privacy bars school officials from spanking school children over parental objection. In addition, the court set forth certain procedural requirements to accompany the administration of corporal punishment. The Supreme Court's affirmance of this three-judge district court judgment was a summary affirmance without opinion. The appeal of that lower court judgment was brought only by the plaintiffs and the only question presented to the Supreme Court was whether parental objection could bar the use of corporal punishment by school officials; defendant state and school officials did not appeal that part of the judgment requiring procedural safeguards. Accordingly, the three-judge district court's pronouncement on procedural requirements was never before the Court and, therefore, its summary affirmance of that lower court's judgment does not bind us to a part of the judgment not appealed.\*

In holding that procedural safeguards accompanying the use of corporal punishment in public schools are not constitutionally mandated, we are cognizant of the Supreme Court's holding in *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975), that an Ohio statute authorizing suspension of public school students without notice of the offense for which suspended and without opportunity for a hearing violates students' rights to procedural due process. The basis for the Court's holding that due process should

\* While the Supreme Court has held that lower courts are bound by summary decisions of the Supreme Court until that Court informs them otherwise, *Hicks v. Miranda*, 422 U.S. 332, 95 S. Ct. 2281, 45 L. Ed. 2d 223 (1975), we believe that *Hicks* can be readily distinguished from the present case. In *Hicks*, the Supreme Court was dealing with the precedential value of a dismissal for want of a substantial federal question; in its holding that such a dismissal carried the same impact as a disposition on the merits, the Court was countering the argument that the precedential value of a dismissal was equivalent only to that of a denial of certiorari. The Court's holding certainly cannot be interpreted to mean that a summary affirmance by the Supreme Court of a lower court judgment is binding on questions not presented to that Court on appeal. See, *Sicard v. Lennox*, 405 U.S. 191, 92 S. Ct. 767, 31 L. Ed. 2d 138 (1972) (Supreme Court's affirmance of District Court judgment insofar as it refused to declare a state's statute unconstitutional does not constitute approval of other aspects and details not before Supreme Court where no cross appeal taken by defendant).

have been afforded plaintiffs was its determination that education was a substantial property interest that the State of Ohio had conferred on plaintiffs and "having chosen to extent the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct absent fundamentally fair procedures \* \* \*." *Id.*, 419 U.S. at 574, 95 S. Ct. at 736, 42 L. Ed. 2d at 734.<sup>10</sup> Noting that a recorded suspension could harm a student's reputation and interfere with later opportunities for higher education and employment, the Court also held that a student's "liberty" interest in maintaining his good name and reputation could not be arbitrarily deprived by a suspension unattended by proper procedures. We believe that there is an important distinction in terms of the applicability of due process standards between a suspension, which involves an exclusion from the educational process itself, and a paddling, which involves no deprivation of a property interest or denial of a claim to education and which is certainly a much less serious event in the life of a child than is a suspension or an expulsion.<sup>11</sup> Likewise, we find no sub-

<sup>10</sup> In applying the "grievous loss" standard, discussed *supra*, to the present facts we are not ignoring the "de minimus" test employed in *Goss* in which the court stated: "Whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake." *Board of Regents v. Roth*, 408 U.S. [564], at 570-71, 92 S. Ct. [2701] at 2705-2706, 33 L. Ed. 2d 548. \* \* \* The Court's view has long been that as long as a property deprivation is not de minimus, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." *Id.* 419 U.S. at 575, 95 S. Ct. at 737, 42 L. Ed. 2d at 735. In so holding, the court was responding to an argument that because a ten-day suspension did not subject a student to a grievous loss, the due process clause did not come into play. Thus, according to the court's reasoning, because total exclusion from the educational process is itself a substantial interest to be protected by the due process clause, the shortness of that period of exclusion cannot suspend the guarantee of procedural safeguards. There is a qualitative difference between an exclusion from the educational process, through suspension, and a routine disciplinary measure such as paddling. The infliction of a paddling, unlike the denial itself of educational benefits, does not subject the student to a "grievous loss" for which constitutionally mandated procedural safeguards apply.

<sup>11</sup> Indeed, this court has often recognized the applicability of the due process clause to expulsions and suspensions. *E.g.*, *Dixon v. Alabama State Board of Education*, 294 F. 2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930, 82 S. Ct. 368, 7 L. Ed. 2d 193 (1961) (due process applicable to a removal for

substantial interest in reputation violated by a paddling, for while a recorded suspension can indeed have a permanent adverse impact on a person's reputation and could conceivably harm that person's chance to obtain employment or higher education, we find it difficult to contend that a paddling, a commonplace and trivial event in the lives of most children, involves any such damage to reputation.

It seems to us that the value of corporal punishment would be severely diluted by elaborate procedural process imposed by this court.<sup>12</sup> To require, for example, a published schedule of infractions for which corporal punishment is authorized, would serve to remove a valid judgmental aspect from a decision which should properly be left to the experienced administrator. Likewise, a hearing procedure could effectively undermine the utility of corporal punishment for the administrator who probably has little time under present procedures to handle all the disciplinary problems which beset him or her. "[T]o hold that the relationship between parents, pupils, and school officials must be conducted in an adverse atmosphere and according to procedural rules by which we are accustomed in a court of law would hardly best serve the interest of any of those involved." *Whatley v. Pike County Board of Education*, *supra*. "The likelihood of the abuse of corporal punishment is minimized by the participation of parents and school boards in school affairs, and by the availability of civil and criminal sanctions against teachers who exceed the limits of moderation. In any event, it is a sanction which simply is not serious enough to require the prerequisite of a formal hearing." *Gonyaw v. Gray*, *supra*, at 371.

In essence, we refuse to set forth, as constitutionally mandated, procedural standards for an activity which is not substantial enough, on a constitutional level, to justify the time

long enough duration to be classified as expulsion); *Black Students of North Fort Myers Jr.-Sr. High School v. Williams*, 470 F. 2d 957 (5th Cir. 1972) (due process applicable to a ten-day suspension).

<sup>12</sup> Dade County School Board Policy 5144 does contain guidelines by which corporal punishment is to be administered. It requires, for example, that the "student understand clearly the seriousness of the offense and the reason for the punishment." If the Policy guidelines are not followed, students would have redress to the School Board.



and effort which would have to be expended by the school in adhering to these procedures or to justify further interference by federal courts into the internal affairs of public schools. If a paddling of a school child subjects him to a "grievous loss" sufficient to require constitutional procedural safeguards under the Fourteenth Amendment, then conceivably a teacher's decision to keep a disobedient child after school or to give a child a failing grade in a course would inflict just as grievous a loss and would require procedures which meet constitutional standards. We do not interpret the due process clause of the Fourteenth Amendment so broadly. In so holding, we are mindful of the oft-quoted statement made by Justice Fortas in *Epperson v. Arkansas*, 393 U.S. 97, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968), in which he asserted:

Judicial interposition in the operation of the public school systems of the nation raises problems requiring care and restraint. \* \* \* By and large, public education in our nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. *Id.* at 104, 89 S. Ct. at 270, 21 L. Ed. 2d at 234.

Affirmed.

GEWIN, Circuit Judge (concurring in the result).

Although I am in full agreement with the majority's resolution of the merits of this case, it is my considered judgment that the jurisdictional statement in the opinion is not in accord with recent decisions of our court. Accordingly, I concur in the majority's affirmance of the district court's dismissal of the complaint, but do not fully agree with the jurisdictional statement.

The majority is quite correct in its conclusion that school boards are often considered to be either arms of or in the nature of municipalities. Hence, under the "non-person" rule of *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S. Ct. 2222, 37 L. Ed. 2d 109 (1973), school boards as entities are not subject to suit under § 1983<sup>1</sup> and its jurisdictional

<sup>1</sup> 42 U.S.C. § 1983.

statute, § 1343.<sup>2</sup> Likewise, the majority opinion is equally correct in its conclusion that a school superintendent is a "person" liable to suit under § 1983.

However, I disagree with the majority's indication that merely because § 1983 jurisdiction over the school board in this case does not exist, there is a lack of jurisdiction in every case involving school boards. We have recently held<sup>3</sup> that, despite the fact that § 1983 jurisdiction over a school board may not be present in a given instance, jurisdiction may be proper under § 1331.<sup>4</sup>

Since I agree with the majority that appellants have not asserted a constitutional claim for relief,<sup>5</sup> the dismissal was proper because § 1331 is of no aid in the absence of such a claim. I do not agree that the mere failure to state a § 1983 claim automatically defeats federal jurisdiction under § 1331.

GODBOLD, Circuit Judge, with whom BROWN, Chief Judge, joins (dissenting):

I agree with Judge Rives that arbitrary and excessive corporal punishment is a denial of substantive due process, although I am not convinced that the punishment in this

<sup>2</sup> 28 U.S.C. § 1343.

<sup>3</sup> *E.g.*, *Roane v. Callisburg Independent School District*, 511 F. 2d 633, 635 n. 1 (5th Cir. 1975) (citations omitted); *Kelly v. West Baton Rouge Parish School Board*, 517 F. 2d 194, 197 (5th Cir. 1975) (citations omitted). Other circuits have utilized the same rationale in holding that *Kenosha* does not bar § 1331 jurisdiction over a municipality, *Brault v. Town of Milton*, 527 F. 2d 730 (2d Cir. 1975) [No. 74-2370, Feb. 24, 1975], or a county, *Cox v. Stanton*, 529 F. 2d 47 (4th Cir. 1975) [No. 74-2218, Oct. 6, 1975].

<sup>4</sup> 28 U.S.C. § 1331.

<sup>5</sup> Although we have not hesitated to find due process and equal protection violations in a variety of circumstances involving schools, *e.g.*, *Lansdale v. Tyler Junior College*, 470 F. 2d 659 (5th Cir. 1972) (en banc) (potential college students not allowed to register because of hair length), *cert denied*, 411 U.S. 986, 93 S. Ct. 2268, 38 L. Ed. 2d 964 (1973), certainly we must have scrupulous regard for principles of federalism in extending the reach of "constitutional common law." See generally Monaghan, *Constitutional Common Law*, 89 Harv. L. Rev. 1, 45 (1975) ("The general guarantees of due process and equal protection are so indeterminate in character that to develop on their authority a body of subconstitutional law would be to go beyond implementation to recognize a judicial power to create a sub-order of liberties without any ascertainable constitutional reference points") (emphasis in original).

case rose to the level of such a violation. I, therefore, disagree with the majority's statement that it would be an abuse of our judicial power to determine whether punishment inflicted in a particular case exceeds constitutional limits. This is a mere rule of convenience, made palatable by characterizing the issue as the difference between five and ten licks. I doubt that the majority really means what it says, and I suspect that if in a future case the punishment inflicted has broken the victim's leg we will face the issue and hold that substantive due process has been violated.

RIVES, Circuit Judge, with whom GOLDBERG and AINSWORTH, Circuit Judges, join (dissenting):

With deference to the en banc majority, I adhere to the original majority opinion and decision reported as *Ingraham v. Wright*, 5 Cir. 1974, 498 F. 2d 248, and make a few additional comments. The district court's "Findings of Fact" were quoted in the original opinion at 498 F. 2d 253, 254, and the facts were more fully detailed at 498 F. 2d 254-258. At the close of the plaintiffs' case the district court dismissed all three counts, holding as to Count Three, the class action, that the plaintiffs had shown no right to relief, and as to Counts One and Two that a jury could not lawfully find that either James Ingraham or Roosevelt Andrews had sustained a deprivation of federal constitutional rights. The en banc court now affirms. On original hearing we reversed and remanded for further proceedings. Reconsidering the law and the undisputed facts, I remain convinced that our original decision is right.

#### I. BAKER V. OWEN

In the present case the panel's majority opinion and Judge Morgan's dissenting opinion were entered on July 29, 1974 (498 F. 2d 248). Since then another case involving the corporal punishment of a sixth grader, Russell Carl Baker, has been heard by a three-judge District Court of the Middle District of North Carolina on January 13, 1975, opinion entered April 23, 1975, judgment entered June 13, 1975, and on appeal judgment affirmed by the Supreme Court on October 15, 1975. *Baker v. Owen*, M.D.N.C. 1975, 395 F. Supp. 294, *aff'd*—U.S.—, 96 S. Ct. 210, 46 L. Ed. 2d 137. The Supreme Court did not leave to implication but ordered in express terms that "the judgment is affirmed." (Emphasis

added.) The judgment of the three-judge district court, entered nearly two months after the entry of its opinion, was not included in the report of the opinion. The judgment reads as follows:

Now, therefore, consistent with the amended opinion it is ORDERED, ADJUDGED, AND DECREED that:

1. North Carolina General Statute §115-146, on its fact, is declared not to be in violation of the Constitution of the United States.

2. Defendants, their agents and servants, and their successors are permanently enjoined in the administration of corporal punishment in the public schools of the State of North Carolina to conform to the minimal due process requirements of the Fourteenth Amendment as follows:

"(a) Except for those acts of misconduct which are so anti-social or disruptive in nature as to shock the conscience, corporal punishment may never be used unless the student was informed beforehand that specific misbehavior could occasion its use, and, subject to this exception, it should never be employed as a first line of punishment for misbehavior. The requirements of an announced possibility of corporal punishment and an attempt to modify behavior by some other means—keeping after school, assigning extra work, or some other punishment—will insure that the child has clear notice that certain behavior subjects him to physical punishment.

"(b) A teacher or principal may punish corporally only in the presence of a second school official (teacher or principal), who must be informed beforehand and in the student's presence of the reason for the punishment. The student need not be afforded a formal opportunity to present his side to the second official; this requirement is intended only to allow a student to protest, spontaneously, an egregiously arbitrary or contrived application of punishment.

"(c) An official who has administered such punishment must provide the child's parent, upon request, a



written explanation of his reasons and the name of the second official who was present.

The above minimal due process requirements are intended to prevent or dissuade the state from further elaboration upon necessary requirements in order to accomplish fairness in administration.

3. The parties shall bear their own costs.

As to paragraph numbered 1 of the judgment, the opinion at 395 F. Supp. 303 shows that the plaintiffs made no claim "that corporal punishment *per se* violates the eighth amendment prohibition of unusual punishment"; that "His teacher, a female, administered two licks to his buttocks with a wooden drawer divider \* \* \*," and that

In short, this record does not begin to present a picture of punishment comparable to that in *Ingraham, supra* [5 Cir. 1974, 498 F. 2d 248], at 255-59, or in *Nelson v. Heyne*, 491 F. 2d 352 (7th Cir. 1974), which we believe indicate the kinds of beatings that could constitute cruel and unusual punishment if the eighth amendment is indeed applicable. 395 F. Supp. at 303.

The district court posed, but did not decide the issue of whether the Eighth Amendment applies to the corporal punishment of school children. 395 F. Supp. at 303.

As to paragraph numbered 2 of the judgment, the district court's opinion made clear the substantive due process constitutional right which made it necessary to inquire as to the type of procedure to be employed:

The initial inquiry must be whether Russell Carl has a liberty or property interest, greater than de minimis, in freedom from corporal punishment such that the fourteenth amendment requires some procedural safeguards against its arbitrary imposition. Only if such an interest is found must we proceed to an inquiry as to the type of procedure to be employed. See generally *Goss v. Lopez, supra*, 419 U.S. [565] at 574, 95 S. Ct. 729 [1975]; *Board of Regents v. Roth*, 408 U.S. 564, 570-71, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 342, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969) (Harlan, J., concurring).

We believe that Russell Carl does have an interest, protected by the concept of liberty in the fourteenth amendment, in avoiding corporal punishment. This conclusion is compelled by a conflux of many premises and postulates. \* \* \*

Having concluded, upon due consideration of all the above factors, that North Carolina school children have a liberty interest, we must decide what procedural safeguards should protect it. 395 F. Supp. at 301, 302.

Relevant to the present appeal, the Supreme Court in affirming the judgment of the district court held that so long as the force used is reasonable, corporal punishment does not violate the Eighth Amendment. It left undecided the issue of whether the Eighth Amendment applies to the corporal punishment of school children.

Acknowledging my indebtedness to Judge Morgan for calling to my attention that only the plaintiffs appealed to the Supreme Court and that no appeal was taken from paragraph 2 of the judgment, I agree that the Supreme Court's affirmance of the judgment did not bind this Court as to paragraph 2. Nonetheless, I submit that paragraph 2 was correctly decided by the district court for the reasons well stated in its opinion.

Some further discussion of the several issues seems warranted.

## II. CRUEL AND UNUSUAL PUNISHMENT

The en banc majority holds that the cruel and unusual punishment clause of the Eighth Amendment has no application to corporal punishment administered to public school children by teachers or administrators regardless of the circumstances or the severity of the punishment. I agree with the contrary holding of the Eighth Circuit in *Bramlet v. Wilson*, 1974, 495 F. 2d 714, 717, for the reasons stated in footnote 20 to the original opinion, 498 F. 2d at 259, 260.

The en banc majority makes brief reference to the legislative history of the Eighth Amendment. That history is sketchy and inconclusive at best. The first ten amendments

were proposed to the legislatures of the several states by the First Congress on September 25, 1789, and were ratified December 15, 1791.

In *Brown v. Board of Education*, 1954, 347 U.S. 483, at 489, 490, 74 S. Ct. 686, 98 L. Ed. 873, the Supreme Court discussed the history of the Fourteenth Amendment with respect to segregated schools as of the time of the adoption of that Amendment in 1868. The rationale of that discussion applies with multiplied intensity to the history of the Eighth Amendment as of 1791 with respect to corporal punishment in the public schools. As the *Brown* opinion demonstrates, public education was in its infancy in 1868. In 1791 it was almost nonexistent.<sup>1</sup> Chief Justice Warren, writing for a unanimous Court in *Brown*, said:

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* [163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256] was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws. 347 U.S. at 492-493, 74 S. Ct. at 691.

Similarly, in *Trop v. Dulles*, 1958, 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L. Ed. 2d 630, with specific reference to the constitutional phrase "cruel and unusual" as used in the Eighth Amendment, Chief Justice Warren said: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

In *Nelson v. Heyne*, 7 Cir. 1974, 491 F. 2d 352, cert. denied 417 U.S. 976, 94 S. Ct. 3183, 41 L. Ed. 2d 1146, that expression was quoted and applied by the Seventh Circuit to a "[s]chool, located in Plainfield, Indiana [which] is a medium security state correctional institution for boys twelve to eighteen years of age, an estimated one-third of whom are

<sup>1</sup> At the time of the American Revolution, schools were predominantly private and denominational. 7 Encyclopedia Britannica, History of Education 991 (1970). The main outlines of the public educational system were not achieved until the middle of the Nineteenth Century. *Id.* at 992.

*non-criminal offenders.*" 491 F. 2d at 353, 354 (emphasis added). The Seventh Circuit held that corporal punishment consisting of beating juveniles with a fraternity paddle, causing painful injuries, was cruel and unusual punishment. While it recognized that the school was both a correctional and an academic institution (491 F. 2d at 354), it did not exclude from its holding the "non-criminal offenders."

It is likely that in 1791 the federal government meted out punishment solely in retribution for crimes. The scope of the Amendment was greatly expanded after it became binding on the states through the Fourteenth Amendment. *Louisiana ex rel. Francis v. Resweber*, 1947, 329 U.S. 459, 463; *Robinson v. California*, 1962, 370 U.S. 660, 666, 82 S. Ct. 1417, 8 L. Ed. 2d 758. The Seventh Circuit in *Nelson v. Heyne*, *supra*, aptly called attention that,

In *re Gault*, 387 U.S. 1, 15-16, 87 S. Ct. 1428, 1437, 18 L. Ed. 2d 527 (1967), the Court stated:

"The early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jails with hardened criminals. . . . The child was to be "treated" and "rehabilitated" and the procedures, from apprehension through institutionalization, were to be "clinical" rather than punitive."

491 F. 2d at 358.

Thus it is not surprising that there should be so little in the history of the Eighth Amendment relating to its intended effect on corporal punishment in the public schools. Today, government has greatly expanded and provides a multitude of social institutions and public services. The administration of punishment is no longer confined to a criminal setting. It is now employed in public schools, see *Bramlet v. Wilson*, *supra*; homes for delinquents, see *Nelson v. Heyne*, *supra*, *Morales v. Turman*, E.D. Tex. 1974, 383 F. Supp. 53, 70-72, and *Collins v. Bensinger*, N.D. Ill. 1974, 374 F. Supp. 273; mental institutions, see *Welsch v. Linkins*, D. Minn. 1974, 373 F. Supp. 487; and even in processing passport applications, see *Trop v. Dulles*, *supra*, 356 U.S. at 88, 78 S. Ct. 590. To paraphrase from Chief Justice Warren in *Brown*, *supra*, 347 U.S. at 492, 74



S. Ct. 686, in approaching this problem, we cannot turn the clock back to 1791.

The majority's other objection to applying the cruel and unusual punishment clause of the Eighth Amendment to this case appears to be one of federalism:

\* \* \* if the force used by defendant teachers in disciplining plaintiff was as severe as plaintiffs allege, a Florida state court could find defendants civilly and criminally liable for tortious conduct exceeding the level of severity authorized by 232.27 of Fla. Stat. Ann. and by Dade County School Board policy 5144. The basis of such actions is, however, tort and criminal law, *not* federal constitutional law. We find it neither proper nor necessary to expand the Eighth Amendment beyond its intended and reasonable scope to encompass an action which is essentially based on the commission of a battery. 525 F. 2d 915.

It has been the province and duty of the federal courts since *Marbury v. Madison*, 1803, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60, to interpret the Constitution and protect constitutional rights. The presence of alternative remedies in state courts should not deter federal judges from their primary duty of defending and supporting the Constitution. *Cf. Monroe v. Pape*, 1961, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492. The claims for relief here involved were brought by plaintiffs under 42 U.S.C. § 1983, which derives from the Civil Rights Act of 1871. In the landmark case construing § 1983, *Monroe v. Pape*, *supra*, the complaint alleged, *inter alia*, that thirteen Chicago police officers broke into the plaintiffs' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. 365 U.S. at 169, 81 S. Ct. 473. Like the corporal punishment in our present case, these acts were, among other tortious conduct, "essentially based on the commission of a battery." The possibility of criminal law proceedings and tort claims against these policemen in state court was found to be no answer, as the federal remedy provided by § 1983 is supplementary to any state remedy. *Id.* at 183, 81 S. Ct. 473. On that score, *Monroe v. Pape*, *supra*, was followed by *McNeese*

*v. Board of Education*, 1963, 373 U.S. 668, 671, 672, 83 S. Ct. 1433, 10 L. Ed. 2d 622, and by many decisions of the courts of appeals and of the district courts, some of which are collected in 42 U.S.C. § 1983 n. 500. I cannot escape the conclusion that these school children have a constitutional right to freedom from cruel and unusual punishment when applied under color of state law, and that it is our duty as federal judges to enforce that right.

### III. SUBSTANTIVE DUE PROCESS

The district court found that "alternative measures in use range from parent and student conferences, the use of guidance counselors and psychologists, where available, to suspension and expulsion." (498 F. 2d at 264. See also footnote 32 which follows.) In the original panel majority opinion, we noted that,

The defendants apparently concede that corporal punishment in Dade County is a relatively serious punishment. In their brief they state that 'Corporal punishment in the public schools of Dade County, Florida, is a last resort means of discipline as an alternative to suspension or expulsion \* \* \*.' (Defendants' Brief, p. 17.) 498 F. 2d at 267.

The administration of cruel and severe corporal punishment can never be justified. The circumstances and severity of the beatings disclosed by the presently undisputed evidence amounted to arbitrary and capricious conduct unrelated to the achievement of any legitimate educational purpose. Such conduct, exercised under color of state law, deprived the plaintiffs of both property and liberty without due process of law.

I submit that the en banc majority errs in the following part of its opinion:

Having determined that corporal punishment itself and corporal punishment as circumscribed by the guidelines in Policy 5144 is not arbitrary, capricious, or unrelated to legitimate educational goals, we refuse to look at each individual instance of punishment to determine if it has been administered arbitrarily or capriciously. We think it a misuse of our judicial power to determine, for example, whether a teacher

has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child.<sup>8</sup>

<sup>8</sup> Indeed, Policy 5144, as effective during 1970-71, provides in part: "The person administering the corporal punishment must realize his own personal liabilities if the student being given corporal punishment is physically injured."

525 F. 2d p. 917. That is in effect to hold that corporal punishment more severe than that "circumscribed" by the Florida Statute § 232.27 and by Dade County School Board Policy 5144 is not done under color of state law. Obviously the conduct of public school teachers or administrators purportedly exercised under authority granted by a state statute and school board regulation is not *excluded* from federal constitutional scrutiny simply because the severity of the beatings exceeded the prescription of the state law. That is implicitly, if not expressly, held in *Baker v. Owen*, *supra*. See also *Jackson v. Bishop*, 8 Cir. 1968, 404 F. 2d 571, 579, 581, discussed in the original panel opinion at 498 F. 2d 261, 262 n. 26. In *United States v. Classic*, 1941, 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368, a criminal action against Louisiana election officials for falsifying election returns, the Supreme Court held that defendants were acting under color of state law when they falsified the returns. These acts, the Court found, were committed "in the course of their performance of duties under the Louisiana statute requiring them to count the ballots, to record the result of the count, and to certify the result of the election." 313 U.S. at 325-326, 61 S. Ct. at 1042-1043. The Court further stated that:

Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law. [Citations omitted.] *Id.* at 326, 61 S. Ct. at 1043.

In *Monroe v. Pape*, *supra*, this definitional view of the words "under color of" was adopted for the civil rights action provided by 42 U.S.C. § 1983. 365 U.S. at 184, 185, 61 S. Ct. 1031. Clearly, the teachers and administrators who administered the spankings in this case did so under color of state law. The fact that they might have misused the power vested in them by the state to administer corporal punishment by inflicting more blows and blows more severe than prescribed does not alter the basic fact that these beatings were performed by officials clothed with state authority.

*Monroe v. Pape*, *supra*, in discussing the legislative history of the Civil Rights Act which gave birth to 42 U.S.C. § 1983, commented:

\* \* \* the remedy created was not a remedy against it [the Ku Klux Klan] or its members but against those who representing a State in some capacity were *unable or unwilling* to enforce a state law.

There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty. (Emphasis that of the Court.) 365 U.S. at 175-176, 81 S. Ct. at 478.

Likewise, in the present case, there is no quarrel with the restrictions on the severity of corporal punishment expressed in the Florida Statute 232.27 and those stated in the Board Policy 5144. "It was their lack of enforcement that was the nub of the difficulty." 365 U.S. at 176, 81 S. Ct. at 478. The district court found that

"There has been a rather widespread failure to adhere to School Board policy regarding corporal punishment. Teachers have punished students without first consulting with their respective principals. More blows have been administered to students than authorized by the policy." 498 F. 2d at 254.

The original panel properly deemed it "more important to know how corporal punishment is actually administered than to know the relevant rules or regulations." 498 F. 2d at 261. The en banc majority would separate sharply the moderate



kind of corporal punishment authorized by the Florida Statute and the Board Policy from the severe beatings administered to the plaintiffs Roosevelt Andrews and James Ingraham and to a few other students.

The original panel recognized the difficulty, or perhaps impossibility, of controlling the severity of corporal punishment (498 F. 2d at 261, 262 n. 26). I submit that the arbitrary, excessive and severe corporal punishment disclosed by the plaintiffs' evidence, thus far undisputed, amounts to a denial of substantive due process of law.

#### IV. PROCEDURAL DUE PROCESS

In the light of the district court's opinion in *Baker v. Owen*, *supra*, it seems clear that the plaintiffs have been denied procedural due process. The circumstances and severity of the beatings disclosed by the plaintiffs' evidence were such as to require the basic right to a hearing of some kind under either the "severe and grievous" or the "de minimis" test. The two tests were contrasted in the latest Supreme Court pronouncement on procedural due process, *Goss v. Lopez*, 1975, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725, and the de minimis test was adopted, "that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause." 419 U.S. at 576, 95 S. Ct. at 737. (citations omitted).

In the present posture of this case, the undisputed evidence discloses much more than a de minimis deprivation of property rights. It shows deprivations of liberty, probability of severe psychological and physical injury, punishment of persons who were protesting their innocence, punishment for no offense whatever, punishment far more severe than warranted by the gravity of the offense, and all without the slightest notice or opportunity for any kind of hearing. Repetition from a few examples should suffice. James Ingraham claimed that he was innocent and refused to be paddled. Principal Wright administered at least twenty licks,<sup>2</sup> while Assistant Principals Deliford and Barnes

<sup>2</sup> Four times the five licks held to constitute cruel and unusual punishment in *Nelson v. Heyne*, *supra*, 491 F. 2d at 354.

held James by his arms and legs and placed him struggling face down across a table. "The district court found that James Ingraham 'received 20 licks with a wooden paddle, which produced a painful and serious hematoma on his buttocks.' (R. 1561)." 498 F. 2d at 256 n. 10. "On October 14, eight days after the paddling, this doctor indicated that James should rest at home 'for next 72 hours.' James testified that it was painful even to lie on his back in the days following the paddling, and that he could not sit comfortably for about three weeks (Tr. 149)." 498 F. 2d at 256. Was James' loss of more than 10 days from school any less a deprivation of property because it resulted from a beating instead of a formal suspension?

Roosevelt Andrews' numerous paddlings were for offenses no more serious than being late or not "dressing out" (498 F. 2d at 256). Roosevelt on one occasion insisted that he was innocent and refused to bend over. Barnes pushed him against the urinals and hit him on his arm, back and neck. Roosevelt complained to Principal Wright, but to no avail (498 F. 2d 257).

Daniel Lee was struck four or five times on the hand for no offense whatever. His hand was X-rayed and, according to Daniel, a bone in his right hand was found to be fractured. The district judge observed an enlargement of his right knuckle (498 F. 2d 258). Other instances of violation of procedural due process are set out in 498 F. 2d at 258, 259. The brutal facts of this case should not be swept under the rug. Clearly, according to the presently undisputed evidence, the plaintiffs have been subjected to cruel and unusual punishment. Under color of state law, they have been arbitrarily deprived of both property and liberty. Even more clearly, they have been denied procedural due process.

The precedent to be set by the en banc majority is that school children have no federal constitutional rights which protect them from cruel and severe beatings administered under color of state law, without any kind of hearing, for the slightest offense or for no offense whatsoever. I strongly disagree and respectfully dissent.

## Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-6527

JAMES INGRAHAM, BY HIS MOTHER AND NEXT FRIEND,  
ELOISE INGRAHAM, ET AL., PETITIONERS

v.

WILLIE J. WRIGHT, I, ET AL.

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Questions 1 and 2, presented by the petition, which read as follows:

1. Does the infliction of severe corporal punishment upon public school students, absent notice of the charges for which punishment is to be inflicted and an opportunity to be heard, violate the due process clause of the Fourteenth Amendment?

2. Does the cruel and unusual punishment clause of the Eighth Amendment apply to the administration of discipline through severe corporal punishment inflicted by public school teachers and administrators upon public school children?

MAY 24, 1976.



Supreme Court, U. S.

FILED

MAY 4 1976

RODAK, JR., CLERK

in the  
**Supreme Court**  
of the  
**United States**

OCTOBER TERM, 1975

No. 75-6527

MIAMI REVIEW — MIAMI, FLORIDA

JAMES INGRAHAM, et al.,

*Petitioners*

*vs.*

WILLIE J. WRIGHT, I, et al.

*Respondents*

BRIEF IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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OCTOBER TERM, 1975

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No. 75-6527

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## STATEMENT OF THE CASE

Petitioners' statement of the case is adequate, although heavily larded with extracts of testimony designed to suggest that the two individual students who brought the action were subjected to some sort of hair-raising brutality. We merely point out that the District Judge who tried the case and heard the testimony, and who assumed that the Eighth Amendment could apply to corporal punishment in public schools, concluded that no jury could lawfully find any deprivation of constitutional rights, and dismissed the students' actions without requiring evidence from the defendants.

## ARGUMENT

### REASONS FOR DENYING THE WRIT

#### 1. The Substantive Due Process Issue

The *en banc* decision of the Court of Appeals held that corporal punishment, both in concept and as regulated by the written policy of the Dade County School Board, is not arbitrary or capricious, and is reasonably related to the legitimate object of maintaining order and discipline in the public schools. No court has held otherwise on this issue — even the earlier panel decision of the Fifth Circuit in this case refused to adopt petitioners' view, urged below, that corporal punishment is "unrelated to the achievement of any legitimate educational purpose," See *Ingraham v. Wright*, 498 F.2d 248, 269 (5th Cir. 1974).

Petitioners make no claim that the decision below presents a conflict of authority, but now for the first time

suggest that a standard of "strict scrutiny" be imposed so as to require a showing of a compelling state interest in the utilization of corporal punishment as a disciplinary alternative by school officials. No court has ever so held, and the cases cited by petitioners do not support their theory. *Skinner v. Oklahoma*, 316 U.S. 535 (1942), was decided under the *equal protection* clause of the Fourteenth Amendment, not the due process clause, and dealt with a discriminatory sterilization statute. The other three cases offered by petitioners all dealt with legislative enactments which were found by the Court to invade "fundamental personal liberties" secured by the Constitution. *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (marital privacy); *Bates v. City of Little Rock*, 361 U.S. 516, 522 (1960) (peaceable assembly); *Shelton v. Tucker*, 364 U.S. 479, 486 (1960) (free association).

No legislative enactment is in issue here, and it can hardly be argued that students enjoy a fundamental personal liberty to attend public schools immune from the possibility of paddling for misbehavior.

The issue narrows, then, to whether or not specific instances of excessive corporal punishment are remediable in federal courts as Fourteenth Amendment violations. Again no court has so held, and as the *en banc* court below observed:

"Certainly the guidelines set down in policy 5144 establishes standards which tend to eliminate arbitrary or capricious elements in any decisions to punish. Having determined that corporal punishment itself and corporal punishment as circumscribed by the guidelines in Policy 5144

is not arbitrary, capricious, or unrelated to legitimate educational goals, we refused to look at each individual instance of punishment to determine if it has been administered arbitrarily or capriciously. We think it a misuse of our judicial power to determine, for example, whether a teacher has acted arbitrarily in paddling a particular child for certain behavior or whether in a particular instance of misconduct five licks would have been a more appropriate punishment than ten licks. We note again the possibility of a civil or criminal action in state court against a teacher who has excessively punished a child."

*Ingraham v. Wright*, 525 F.2d 909, 917 (5th Cir. 1976)

The point we make here is underscored by the Court's very recent decision in *Paul v. Davis*, 44 LW 4337 (1976), in which the opinion makes clear that the due process clause of the Fourteenth Amendment does *not* provide, through the vehicle of 42 U.S.C. sec. 1983, a federal cause of action for any and all wrongs by government employees which have heretofore been thought to give rise only to state law tort claims. The individual petitioners, and other students who claim to have suffered unreasonable punishment, have perfectly adequate remedies under state law. There is no clear call for this Court to create a new federal tort.

## 2. The Procedural Due Process Issue

The "Question Presented for Review" on this point by petitioners contains an internal paradox, and distorts

the issue. Paraphrased, the question posed by petitioners is whether the infliction of *severe* corporal punishment must be preceded by due process procedural steps mandated by the Fourteenth Amendment. Obviously enough, petitioners would not concede (nor would we) the converse proposition — that preliminary procedural steps would legitimize the subsequent application of *severe* corporal punishment. A rule of constitutional law which only required notice, a hearing, and other preliminaries as a prelude to *excessive* punishment would be ridiculous on its face.

The true issue, then, is whether the Fourteenth Amendment mandates preliminary procedural requirements before *any* corporal punishment may be administered to public school students. The *en banc* court below held that it does not.

Petitioners attempt to argue that the *en banc* decision presents this Court with conflicts of authority on this issue, as a basis for jurisdiction by writ of certiorari. It does not. No other court of appeals has rendered a contrary decision. With the sole exception of *Baker v. Owen*, 395 F.Supp. 294 (M.D.N.C.1975), *aff'd* \_\_\_\_\_ U.S. \_\_\_\_\_, 96 S.Ct. 210 (1975), no federal district court has found procedural due process requirements to be necessary as a prerequisite to corporal punishment by school administrators. This Court's affirmance in that case, as pointed out by the Fifth Circuit in its decision below, did not constitute a ruling on this issue, which was not before the Court. *See Ingraham v. Wright*, 525 F.2d 909, 918 (5th Cir.1976).



Petitioners' argument is thus reduced to reliance upon *Goss v. Lopez*, 419 U.S. 565 (1975), either as providing a conflict with the decision below, or as suggesting that due process machinery as an inevitable fixture in connection with corporal punishment is a question of such magnitude that it demands resolution by the Court.

There is no direct conflict with *Goss*, of course, since that decision dealt with suspensions of students from school. Furthermore, that very difference in the nature of the penalties involved — removal from the educational process by suspension, as opposed to temporary bodily discomfort while *remaining* in the educational process by paddling — serves to illustrate the inapplicability of *Goss*, and the wisdom of the court below.

This Court in *Goss* found suspension to be a deprivation of a substantial property interest (education) conferred by the state of Ohio, with consequential effects upon the student's employment prospects and reputation. In contrast, the very purpose of corporal punishment as a disciplinary measure is to avoid exclusion of the student from his studies. He suffers no property loss, and his interest in being free from pain in the posterior, while real enough to the misbehaving student, has no realistic implications for his future employment or standing in the community.

The true basis of *Goss v. Lopez* was illuminated by this Court's decision in *Paul v. Davis, supra*. The Court there holds that for a federal cause of action to arise under 42 U.S.C. sec. 1983, there must be a deprivation of a *right*, secured either by state law or the Constitution, not merely an incident of tortious conduct by a state employee. Neither the law of Florida nor the Fourteenth Amend-

ment can be said to guarantee a public school student the right to attend school free of physical discomfort as punishment for misconduct. If the punishment is severe the student has a civil remedy in the state court, but he has no interest of constitutional proportions which would justify the mechanics of procedural due process prior to any paddling of whatever sort, for whatever offense.

Procedural due process requirements in the context of public education obviously must have a stopping point, if the federal courts are not to become overseers of all educational decisions which in one way or another might be perceived by students, or parents, as undesirable. The *en banc* decision below correctly draws the line at corporal punishment, and it is unnecessary for this Court to deal with the matter.

### 3. The Cruel and Unusual Punishment Issue

The *en banc* court below, after careful analysis of the historic purpose and judicial interpretation of the Eighth Amendment, held squarely that it should not and does not apply to the disciplinary use of corporal punishment in public schools.

As the court below points out, only one case, *Bramlet v. Wilson*, 495 F.2d 714 (8th Cir.1974), has held to the contrary, although a few district court decisions have assumed the applicability of the Eighth Amendment to school discipline, without really examining the problem. See *Ingraham v. Wright*, 525 F.2d 909, 913 (5th Cir.1976) (footnote 3). An examination of those cases, and particularly of *Bramlet v. Wilson, supra*, quickly discloses that the treatment of the Eighth Amendment question has been

superficial, at best, and demonstrates that only the *en banc* Court of Appeals for the Fifth Circuit has really given the issue thorough research and analysis.

Petitioners rely upon *Bramlet v. Wilson*, *supra*, as creating a conflict among courts of appeal sufficient to induce this Court to take jurisdiction. The apparent conflict is insubstantial, and by no means demands this Court's attention. In the first place, the Eighth Circuit in *Bramlet* was dealing only with the face of a complaint dismissed below, and simply reversed, following the orthodox rule that prohibits dismissal where a plaintiff might prove some possible set of facts which would entitle him to relief. In contrast, the Fifth Circuit in this case was reviewing a full-blown record of proceedings below, including a week-long trial. Secondly, *Bramlet* was decided by only two judges of the Eighth Circuit, with the Chief Judge dissenting. The present case was decided by the Fifth Circuit sitting *en banc*, on rehearing after the initial panel decision, with all but three judges concurring in the decision with respect to the Eighth Amendment. Finally, the opinion in *Bramlet* makes no analysis whatever of the history, intent or interpretation of the Eighth Amendment, as does the *en banc* court below.

Indeed, the court in *Bramlet* appears to rest its conclusion only upon cases involving corporal punishment administered to adult prisoners, *Jackson v. Bishop*, 404 F.2d 571 (8th Cir.1968), and to juvenile offenders in a state correctional institution, *Nelson v. Heyne*, 491 F.2d 352 (7th Cir.1974). As the court below pointedly observed, prisons and public schools are not analogous for the purpose of Eighth Amendment scrutiny. Corporal punishment to prisoners, adult or juvenile, is easily seen as cruel

and unusual, since the prisoners have already been deprived of their liberty, and no rational purpose is served by inflicting pain, rather than utilizing other means of correction, such as isolating those guilty of misbehavior. Punishment to prisoners is clearly an extension of the original criminal sanction of confinement. Abuse is much more likely, given the seclusion of prisoners from their families and from public scrutiny.

None of these considerations apply in the case of public school students, and so the *Bramlet* decision is unpersuasive and unsupported as viable precedent. It is not likely to be followed, or even adhered to by the Eighth Circuit, in the wake of the comprehensive decision of the *en banc* court in the present case.

The remaining question is whether this aspect of the case presents such an important issue of federal law as to require settlement by this Court. As a matter of interest, we note that the Court has once refused to review a case involving corporal punishment in public schools, in which the applicability of the Eighth Amendment was in issue. *Ware v. Estes*, 328 F.Supp. 657 (N.D.Tex.1971), *aff'd per curiam* 458 F.2d 1360 (5th Cir.1972), *cert. den.* 409 U.S. 1027 (1972).

Judging from the very few cases on the point which have arisen in the entire country, it is difficult to perceive a burning need for a constitutional pronouncement from this Court, at the expense of other truly critical problems which crowd the docket and compete for the Court's consideration.



Finally, we advert again to this Court's very recent views in *Paul v. Davis, supra*. The extension of the Eighth Amendment to permit a federal action under 42 U.S.C. sec. 1983 by any school student who alleged harm through corporal punishment would be a classic example of the premise explicitly rejected by the Court in *Paul v. Davis* — that the Fourteenth Amendment and sec. 1983 make actionable “. . . wrongs inflicted by government employees which had heretofore been thought to give rise only to state law tort claims.” The *en banc* decision of the Fifth Circuit in this case made precisely the same point in these words (525 F.2d 909 at 915):

“We do not mean to imply by our holding that we condone child abuse either in the home or the schools. We abhor any exercise of discipline which could result in serious or permanent injury to the child. Indeed, if the force used by defendant teachers in disciplining plaintiff was as severe as plaintiffs allege, a Florida state court could find defendants civilly and criminally liable for tortious conduct exceeding the level of severity authorized by 232.27 Fla. Stat. Ann. and by Dade County School Board policy 5144. The basis of such actions is, however, tort and criminal law, *not* federal constitutional law. We find it neither proper nor necessary to expand the Eighth Amendment beyond its intended and reasonable scope to encompass an action which is essentially based on the commission of a battery.”

## CONCLUSION

The Court of Appeals for the Fifth Circuit first introduced the Constitution to the campus, and has never been slow to recognize and articulate the essential rights of students within the context of public educational institutions. See generally Wright, *The Constitution on the Campus*, 22 Vanderbilt L.Rev.1027(1969). Now that court, sitting *en banc*, has clearly and carefully drawn the line and refused to read into the Constitution new and inappropriate and unnecessary avenues for fresh traffic in federal litigation over incidents of corporal punishment in the schools.

By any realistic appraisal, the time-honored and almost universal use of moderate corporal punishment as a prompt disciplinary measure in public schools is a rational alternative to more drastic exclusionary devices. The Fourteenth Amendment does not command, nor does experience suggest, the necessity that federal courts must lay down formal due process procedures to satisfy the emotional notion that the transitory discomfort of a paddling somehow deprives a school child of a constitutional right.

Punishments will occasionally exceed moderate proportions, but it does not follow that these incidents must reach constitutional proportions. Adequate state remedies are available, and the Eighth Amendment should not be warped from its true intent and meaning. If it applies to give a federal remedy to a child spanked in school, it should equally apply to a citizen who suffers a punch in the nose from a policeman, and the further development of “federal tort law” would benefit immensely.

No conflict of authority is presented in this case with respect to the due process issues, and the single contrary appellate decision on the Eighth Amendment issue is thin, ill-considered and of no substantial precedential value. The *en banc* decision below is comprehensive and correct, and petitioners have failed to show why this Court should disturb it. The petition should be denied.

Respectfully submitted,

---

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### CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari have been served upon all parties required to be served, service having been effected by mail, in accordance with paragraph 1 of Rule 33 of the Rules of the Supreme Court of the United States, to the following named attorneys of record, on the \_\_\_\_\_ day of May, 1976.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1976

Supreme Court, U. S.  
**FILED**

**NOV 3 1976**

**MICHAEL RODAK, JR., CLERK**

**No. 75-6527**

**JAMES INGRAHAM**, by his mother and  
next friend, **ELOISE INGRAHAM**, *et al.*,

*Petitioners,*

v.

**WILLIE J. WRIGHT, I**, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

**BRIEF FOR PETITIONERS**

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

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No. 75-6527

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JAMES INGRAHAM, by his mother and  
next friend, ELOISE INGRAHAM, *et al.*,

*Petitioners,*

v.

WILLIE J. WRIGHT, I, *et al.*,

*Respondents.*

---

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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**BRIEF FOR PETITIONERS**

---

**OPINIONS BELOW**

The opinion of the Court of Appeals, *en banc*, is reported at 525 F.2d 909. The original panel decision, which held in favor of the Petitioners, is reported at 498 F.2d 248. Copies of both opinions and the original

orders of dismissal entered by the United States District Court for the Southern District of Florida are reprinted in the Appendix.

## JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 1976. The Petition for Writ of Certiorari was timely filed. The Petition was granted on May 24, 1976. The jurisdiction of this Court is based upon Title 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

### I.

DOES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT APPLY TO THE ADMINISTRATION OF DISCIPLINE THROUGH SEVERE CORPORAL PUNISHMENT INFLICTED BY PUBLIC SCHOOL TEACHERS AND ADMINISTRATORS UPON PUBLIC SCHOOL CHILDREN?

### II.

DOES THE INFLICTION OF SEVERE CORPORAL PUNISHMENT UPON PUBLIC SCHOOL STUDENTS, ABSENT NOTICE OF THE CHARGES FOR WHICH PUNISHMENT IS TO BE INFLICTED AND AN OPPORTUNITY TO BE HEARD, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

## CONSTITUTIONAL PROVISIONS INVOLVED

### AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

### AMENDMENT XIV

... nor shall any state deprive any person of life, liberty or property without due process of law;...

## STATEMENT OF THE CASE

Certiorari was granted in this case to review the *en banc* decision of the Court of Appeals, which held that *any* degree of corporal punishment inflicted upon public school students does not come within the scope of the Eighth Amendment protection, nor must the punishment be preceded by any procedural due process protections. The *en banc* majority reversed the original panel decision, which had concluded that the severity of punishment at one junior high school in the Dade County, Florida, Public School System violated the Eighth Amendment's prohibition against cruel and unusual punishment, and that some procedural safeguards must be utilized before meting out corporal punishment.

The view of the *en banc* majority was uncompromising. Its holding stands for the proposition that no matter how severe or brutal, punishment inflicted upon public school children by school officials is not banned by the Eighth Amendment. It also found that



physical punishment involved no deprivation of a right sufficient to activate the procedural guarantees of the Due Process Clause.

Certiorari was granted to review that decision.

This case originated in 1971 when the Petitioners, James Ingraham and Roosevelt Andrews, filed a three-count complaint in the United States District Court for the Southern District of Florida, seeking declaratory and injunctive relief against the use of corporal punishment in Dade County, Florida, public schools, and damages for personal injuries resulting from the corporal punishment administered to them by Respondents Wright, Deliford and Barnes (App. 1-10).<sup>1</sup> Ingraham and Andrews had been students at Charles R. Drew Junior High School. Wright was the Principal of the school, Deliford the Assistant Principal, and Barnes an Assistant to the Principal (App. 2).

The declaratory and injunctive relief was sought on behalf of a class, described by the District Court in its certification order as:

All students of the Dade County School system who are subject to the corporal punishment policies issued by the Defendant, Dade County School Board, with the exception of Miss Karen Grumwell, who specifically requested that she not be made a part of the class.

(App. 19).

The equitable claims, which were contained in Count III of the Complaint (App. 6-8), were tried by the District Court Judge without a jury. At the close of the Petitioners' evidence, which consisted of documentary

<sup>1</sup> References to the Appendix denote that those portions of the voluminous trial record are included in the Joint Appendix submitted to the Court. Other references are to the original record, which has been filed with the Clerk.

evidence and the testimony of sixteen students, several parents and relatives of students, an educational psychology professor and a number of school teachers and administrators, the Respondents successfully moved for dismissal under Rule 41(b), Federal Rules of Civil Procedure.<sup>2</sup> The District Court Order of Dismissal found that "corporal punishment, inflicted in some of the schools of Dade County, may be harsh, oppressive and of doubtful propriety" (App. 154) and "may be administered in such a way that the resultant psychological harm to some students will be substantial and lasting" (App. 154). Nevertheless, the Court concluded that:

Considering the system as a whole, there is no showing of severe punishment degrading to human dignity, nor of the arbitrary infliction of severe punishment, nor of the unacceptability to contemporary society of corporal punishment in the schools, nor of excessive or disproportionately severe punishment.

(App. 155).

<sup>2</sup> The pertinent portion of that Rule provides:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

The District Court also found that no formal notice and hearing were required before inflicting corporal punishment with a wooden instrument known as a paddle (App. 155-156).

Thereafter, the parties agreed that the evidence offered to support the equitable claims, plus some additional stipulated testimony, should be viewed as the Petitioners' evidence in the damage claims (App. 147). The Court then considered a Rule 41(b) motion for a directed verdict on those claims, and granted the motion, stating:

The undisputed facts regarding Ingraham and Andrews cannot demonstrate the elements of severity, arbitrary infliction, unacceptability in terms of contemporary standards, or gross disproportion which are necessary to bring "punishment" to the level of "cruel and unusual" punishment. Therefore a jury could not lawfully find that either of these plaintiffs sustained a deprivation of rights under the Eighth Amendment.

With the entry of those two orders (App. 147, 150), the entire case was dismissed. The Petitioners appealed.<sup>3</sup>

<sup>3</sup> Although the named plaintiffs, Ingraham and Andrews, are no longer in school, this case is not moot. Their damage claims based upon violations of the Eighth and Fourteenth Amendments present a live controversy. In addition, the class members' right to injunctive relief against cruel and unusual punishment and violations of due process also survive. While an injunction is of no present value to the named plaintiffs, "This case belongs, however, to that narrow class of cases in which the termination of a class representative's claim does not moot the claims of the unnamed members of the class" *Gerstein v. Pugh*, 420 U.S. 103, 110, n. 11. This case shares each of the factors enumerated in *Gerstein v. Pugh* as reasons for finding that the issues were not moot.

The original Court of Appeals panel held that the District Court erred in dismissing the three counts. Their conclusion was based upon the finding that the punishment imposed upon students at the Drew Junior High School in Dade County, Florida, was so oppressive that it violated the Eighth and Fourteenth Amendments. *Ingraham v. Wright*, 498 F.2d 248 (5th Cir. 1974) (App. 158).

A Petition for Rehearing *en banc* was granted. Upon rehearing, the original panel decision was reversed, and the District Court Orders of Dismissal affirmed. *Ingraham v. Wright*, 525 F.2d 909 (1976) (App. 180). The granting of certiorari followed.

The issues presented by the *en banc* decision are raised by the exceptional facts of this case. Those facts reflect that at the Drew Junior High School in Miami, Florida, the Respondents engaged in a pattern and practice of inflicting repeated and continual bodily pain and injury upon thirteen, fourteen and fifteen-year-old junior high school students as a means of punishing them for alleged violations of myriad school rules. The punishment was effected by a "paddle," a flat wooden instrument, approximately two feet long (App. 146). As we argue in Point I, that repeated and continual punishment was so severe and excessive at Drew that it ran afoul of the prohibition against cruel and unusual punishments. And, in Point II, we contend that the imposition of any corporal punishment by an instrument designed to cause bodily pain results in a serious loss of liberty which requires some minimal due process protections.

The Petitioners do not attempt to characterize *all* corporal punishment inflicted upon public school



students as "cruel and unusual." Only the severe punishment which this record presents is claimed to be cruel and unusual. Nor do we urge that all corporal punishment must be preceded by informal due process procedures. Only summary punishment imposed by an instrument designed to cause bodily pain, like the paddle used by the Respondents, requires some due process protection.

Therefore, we turn to the facts, to the ambience of oppression at Drew Junior High School, which raises the Petitioners' constitutional claims.

### STATEMENT OF THE FACTS

The authority for corporal punishment in Florida is found in Florida Statutes Section 232.27:

#### *Authority of teacher*

Each teacher or other member of the staff of any school shall assume such authority for the control of pupils as may be assigned to him by the principal and shall keep good order in the classroom and in other places in which he is assigned to be in charge of pupils, but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unduly severe in nature.

The Dade County School Board implemented the Statute by promulgating School Board Policy 5144, authorizing corporal punishment and outlining the

procedures to be utilized in administering the punishment.<sup>4</sup> Under the color of the Statute and Policy 5144, the Respondents wielded their weapon upon:

### A. JAMES INGRAHAM

On October 6, 1970, fourteen-year-old James Ingraham and some other students were allegedly slow in leaving the stage of the school auditorium. They were taken to the office of Respondent Wright, the Principal, to be paddled. James protested his innocence and refused to assume the paddling position. Respondents Barnes and Deliford were called in to assist (App. 72-73):

Q ... Then what happened?

A ... Then they grabbed me; took me across the table.

Q Who were "they"?

A Mr. Deliford, Mr. Barnes and Mr. Wright.

...

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<sup>4</sup>The policy and its subsequent revisions are contained in the Appendix, pp. 125-132. Both decisions below commented upon the Policies. 498 F.2d at 254-255, notes 5 and 7 (App. 162, 163); 525 F.2d at 916, n. 6 (App. 186). Because the *en banc* majority's opinion precludes all constitutional protections, no matter what the policies or practices may be, the Policies are superfluous and thus not reproduced here. It is interesting to note, however, that neither the statutory nor policy prohibitions against inflicting corporal punishment before consulting the Principal were effective. Of the 255 non-Principal paddlers in the Dade County Public Schools, 59, or over 23%, admitted they beat students without "regularly and routinely" conferring with their respective Principals. (Pl. Ex. 11, App. 142).

Q You say Mr. Barnes and Mr. Deliford did what?

A Put me across the table.

Q Show me how they did that.

A Like this here; across this way.

...

Let the record reflect the witness is lying prone, face down, across the table, with his feet off the floor.

Q Who held you there?

A Mr. Barnes and Mr. Deliford.

Q Who held what?

A Mr. Barnes held my legs and Mr. Deliford held my arms.

Q Who paddled you?

A Mr. Wright.

Q You said he was going to give you how many licks?

A Twenty.

Q How many did he give you?

A More than twenty.

...

Q Did it hurt?

A Yes, it hurt.

Q Did you cry?

A Yeah.

(App. 74-75).

The injury which that beating caused is pictured in the Appendix (App. 140).

After the paddling, James went home, notwithstanding Wright's admonition to wait outside the office: "[H]e said if I moved he was going to bust me on the

side of my head" (App. 75). His mother, recognizing the seriousness of the injury, sought medical treatment for him.

The injury was diagnosed to be a hematoma (App. 133). Pain and sleeping pills, a laxative, ice packs and a week at home were prescribed (App. 133-134). Several days after the paddling, another doctor found "serousness or fluid oozing from the hematoma" (App. 136), and on October 14, eight days after the incident, James was advised by his doctor to rest at home "for the next 72 hours." (App. 137). He was unable to sit comfortably for about three weeks (App. 78).

James attended Drew for only half of his eighth grade year (App. 67). He experienced one other paddling—a mass paddling inflicted upon a whole gym class for "talking" by a teacher who first put a leather glove on his hand so his hand "wouldn't sting when he hit you with the board." (App. 69).

## B. ROOSEVELT ANDREWS

Roosevelt Andrews' tenure at Drew was twice as long as Ingraham's, but he received five times as many beatings. He was there for a year (App. 90) and was paddled about ten times (App. 99). Roosevelt had been a victim of the corporal punishment system in Dade County for some time. He had been paddled as early as the second and third grades, and in the fifth and sixth grades, he was paddled for tardiness, making noise and "messaging around." (App. 90-93).



The summary punishment he suffered at Drew included a paddling for not having tennis shoes in gym class:

Q Why didn't you have any tennis shoes?

A Somebody stole them.

Q Why didn't you buy new tennis shoes?

A Because I didn't have no money.

Q Who paddled you then; Mr. Wright or Mr. Kemp? [The physical education teachers].

A Mr. Kemp.

Q Did you explain it to Mr. Kemp?

A Tried

Q What did he say?

A He said, "That ain't no excuse."

Q Did you tell him that you didn't have any money to buy new shoes?

A I ain't tell him I ain't got no money. I tell him I couldn't get none right now.

Q Do you live in a public housing project now?

A Yeah.

(App. 102-103).

Roosevelt was beaten by Respondent Deliford several times (App. 105) and Respondent Barnes, who nearly always carried a paddle with him (e.g., App. 80, 106; Tr. 476, 496-497), paddled Roosevelt four times within a twenty-day period (App. 106-107; Pl. Ex. 13, Tabs 8, 9, 10 and last page). One of the Barnes' beatings was a mass paddling in the bathroom. The charge was tardiness. Roosevelt claimed innocence. Nevertheless, together with fourteen or fifteen other boys, he was

compelled to lean against the urinals and, while some "hollering, cry, prayed and everything else [sic]" (App. 109), all were beaten.

Although Roosevelt's father angrily protested the punishment in a meeting with Wright, Deliford and Barnes, the Respondents were not inhibited (App. 111-113). Within the next ten days, Wright again paddled Roosevelt, striking him on the buttocks and the wrist, causing him to seek medical treatment and lose the full use of his wrist and arm for a week (App. 114-116).

### C. REGINALD BLOOM

Reginald was paddled "about fifteen times in his three-years at Drew Junior High School (Tr. 490, 493). Some of these paddlings were for not having gym shorts. The fact that they had been stolen was no excuse (Tr. 494). But the worst whipping was inflicted by Deliford. He gave Reginald "fifty licks" with "a board" for allegedly making an obscene phone call to a teacher (Tr. 501, 524-525). The bruises caused him to seek medical attention (Tr. 510). He could not sit down for three weeks as a result of the injury (Tr. 509).

Reginald also told of Barnes' daily paddlings of students, sometimes for "a shirttail hanging out," sometimes for "chewing gum" (Tr. 521).

**D. DONALD THOMAS**

Donald received between five and ten paddlings from Barnes under a unique system. The seats in the auditorium at Drew were numbered, and if a student allegedly misbehaved, his number was written on the blackboard by a teacher. Barnes would walk in the auditorium, call out the numbers and administer four or five licks of the paddle to five to eight students daily (Tr. 423-425).

**E. RODNEY WILLIAMS**

Rodney was one of the victims of the auditorium number system. He had been paddled "plenty of times" at Drew (Tr. 600), but because he stood up in his seat to wipe off some grease, his number went up, and he received a memorable whipping. He recalled the event:

So he [the teacher] put my number on the board. So when Mr. Barnes came, he asked for me and took me to the office and told me to hook up.

Q What did he mean by "hook up"?

A Grab a chair, you know. The chair, he mean by hooking up on the chair.

Q In preparation to being paddled.

A So I refuse. I told him, I say, "Mr. Barnes, I didn't do nothing; that's why I refuse not to take a whipping."

Q What did he do?

A So he told me, say, "You are going to take this one."

I said, "Mr. Barnes, I didn't do nothing. I'm not taking no whipping."

So I was leaning over the table and I said, "I'm not taking a whipping," and I was hit across the head with the board. He was hitting me across the head with the board, and my back and everything.

Q He was whipping you where?

A Across the head, with the board. He was hitting me all across the head and on the back. I was begging him for mercy to stop and he wouldn't listen.

So he had some chairs in there and I was falling in the chairs as he was hitting me with the board.

Then after a while he took off his belt and then started to hit me with the belt and hit me with the buckle part, and tears was coming out of me.

(Tr. 594-595).

Two or three days later Rodney's head became swollen. He was anesthetized and a protuberance of some sort was lanced. "Pus and water and blood shot out." Rodney was out of school for a week and was left with a permanent record of the incident--a half-inch scar on the side of his forehead (Tr. 596-597). Two other paddlings caused him to cough up blood (Tr. 601, 604).



**F. DANIEL LEE**

Daniel suffered a permanent injury which the District Court described. Observing his hand, the District Judge said: "It seems to me to be disfigured, a portion of his right knuckle is enlarged to some degree" (Tr. 483). He received that when he did not acquiesce to getting "a little piece of the board" (Tr. 480):

Q Are you telling the Court that Mr. Barnes hauled off and deliberately hit you on the hand?

A Yes, sir; because he tried to throw me against the chair, you know, and I wouldn't get over there and so he grabbed me and hit me on the hand with the board.

He was trying to hit you on the rear end, wasn't he?

A No.

Q Are you saying he deliberately hit you on the hand?

A Yes, sir.

(Tr. 487-488).

**G. LARRY JONES**

Larry was paddled "a heap of times . . . around about 10" (Tr. 648). He received seven licks (Tr. 650), five licks (Tr. 653), ten licks (Tr. 655), and "two knots on my head" for not wanting a beating (Tr. 651).

**H. JANICE DEAN**

Severe corporal punishment at Drew was not limited to boys. A woman physical education teacher paddled Janice and forty other girls because a girl's money was stolen (Tr. 809). Deliford gave Janice "five licks" on her first day at Drew because she sat in the wrong auditorium seat. The punishment was inflicted in front of a class of 300 students (Tr. 815-816). Wright gave her and four other girls three licks for allegedly hollering in the hall (Tr. 821-822). Barnes gave Janice fifteen licks after she had been sent to his office by the typing teacher. He had no idea what she had allegedly done, only that Janice and some other students "had done something wrong or we wouldn't have been there." (Tr. 817-820).

This is a unique case. There cannot be many schools which have suffered the kind of despotism which existed at Drew Junior High School. The atmosphere of oppression was created by more than the paddle. Several witnesses testified that they saw Barnes and Deliford with brass knuckles (Tr. 328, 449, 655). Thankfully, those instruments were not used to inflict punishment, but their mere presence underscores the potential danger of the *en banc* majority decision, allowing constitutional leeway to any corporal punishment visited upon students, no matter how brutal.

The corporal punishment reflected by this record was severe and summary. For the reasons which we set

forth below, we contend that the punishment inflicted upon the students at Drew Junior High School under color of state law violated the Eighth and Fourteenth Amendment rights of the Petitioners and the class they represent.

## SUMMARY OF ARGUMENT

### I.

#### THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT APPLIES TO PUBLIC SCHOOL CHILDREN. THE SEVERE CORPORAL PUNISHMENT INVOLVED IN THIS CASE VIOLATES BOTH THE CONTEMPORARY VALUES AND HUMAN DIGNITY TESTS OF THE EIGHTH AMENDMENT.

A. "School officials do not possess absolute authority over children." *Tinker v. Des Moines School District*, 393 U.S. 503, 511 (1969). Students are entitled to the protections of the Constitution, and they do not lose their fundamental constitutional rights when they enter the "schoolhouse door." *Goss v. Lopez*, 419 U.S. 565, 574 (1974).

One of the fundamental rights guaranteed by the Fourteenth Amendment is the right to be free from cruel and unusual punishments. *Gregg v. Georgia*, \_\_\_\_ U.S. \_\_\_\_, 44 L.W. 5230 (July 2, 1976). That freedom is not limited to punishments imposed upon persons convicted of crimes. If that theory were adopted, public school children could be savagely beaten by their

teachers under color of state law and be without constitutional redress, while hardened criminals suffering the same beatings at the hands of their jailers would have constitutional claims. It is inconceivable that the drafters of the Eighth Amendment intended to rule out the rack and screw for criminals, but not for school children.

While the enactment of the cruel and unusual clause was aimed at proscribing barbarous methods to punish crime, the drafters could not have envisioned the expansion of governmental services and regulations giving rise to the opportunities for punishment unknown in 1791. Our present public education system began in the 1850's, long after the adoption of the Eighth Amendment. Attempting to limit it to criminal punishments ignores the dynamic approach this Court had taken in interpreting the Eighth Amendment:

... a principle to be vital must be capable of wider application than the mischief which gave it birth.  
*Weems v. United States*, 217 U.S. 349, 373 (1910).

The punishments meted out to the Petitioners and their class were "penal" as defined in *Trop v. Dulles*, 356 U.S. 86, 96 (1958). The School Board Policy described it as the "inflicting of a penalty for an offense" (App. 126). Attaching a civil or criminal label is meaningless. Cf. *In re Gault*, 387 U.S. 1, 17 (1969). Two courts of appeal have concluded that students as well as criminals are protected by the Eighth Amendment. *Bramlett v. Wilson*, 495 F.2d 714 (8th Cir. 1974), and *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974). Any other conclusion creates an intolerable



constitutional incongruity, giving criminals more protection than children from abuses at the hands of persons acting under color of state law.

B. While ten states specifically permit corporal punishment by statute, no state condones severe corporal punishment—the repeated and continued inflicting of bodily pain by an instrument designed to cause such pain. Thus, while there may be a degree of public tolerance for some corporal punishment upon school children, it is clear that contemporary values reflect that the sanction of severe corporal punishment is morally objectionable.

Therefore, under the contemporary values test, *Gregg v. Georgia*, 44 L.W. at 5235, the severe punishment inflicted upon the students at Drew Junior High School was cruel and unusual and violated the Eighth Amendment.

C. The penalties imposed at Drew involved “the unnecessary and wanton infliction of pain” and were “grossly out of proportion to the severity” of the offenses allegedly committed by the Petitioners and their class. Therefore, they were excessive under the test applied in *Gregg v. Georgia*, 44 L.W. at 5236.

Any nontraditional penalty is constitutionally suspect as excessive. *Trop v. Dulles*, 356 U.S. at 100. In a school setting, suspensions, expulsions and keeping students after class are “traditional means” for maintaining discipline. *Goss v. Lopez*, 419 U.S. 565, at 591 (Powell, J., dissenting). The continual infliction of bodily pain by an instrument designed to cause such pain is not traditional. It is an affront to human dignity. It can be justified only if some compelling or

rational governmental interest is served by it. There is a valid societal purpose for imposing the ultimate form of corporal punishment—death—for the ultimate atrocity—murder. But severe corporal punishment serves no societal purpose. No respected authority believes that the infliction of such punishment accomplishes valid educational goals.

The Court has made it apparent that even for the most heinous violation of a social norm, an extraordinary penalty must be shown to accomplish its task of promoting stability in a society governed by law. *Gregg v. Georgia*, *supra*. Since there can be no similar showing with respect to the kind of punishment presented in this case, the Petitioners’ Eighth Amendment rights were breached.

## II.

### THE INFLICTION OF ANY BODILY PAIN UPON PUBLIC SCHOOL CHILDREN BY AN INSTRUMENT DESIGNED TO CAUSE SUCH PAIN DEPRIVES STUDENTS OF RIGHTS TO LIBERTY GUARANTEED BY THE FOURTH AND FOURTEENTH AMENDMENTS. SOME MINIMAL DUE PROCESS PROTECTIONS MUST PRECEDE THE IMPOSITION OF THAT KIND OF CORPORAL PUNISHMENT.

A. The right to liberty is broad. It at least means the right to be free from “bodily restraint” and the right to enjoy “privileges long recognized as essential to the orderly pursuit of happiness by free men.” *Meyer v.*

*Nebraska*, 262 U.S. 390, 399 (1923). The right to be free from unjustified physical assaults under color of state law fits that definition. The Fourth Amendment's "overriding function . . . is to protect personal privacy and dignity against unwarranted intrusion by the state." *Schmerber v. California*, 384 U.S. 757, 767 (1966). The corporal punishment inflicted in this case caused physical, emotional and reputational injuries. "Liberty" as a broad concept, or as a Fourth Amendment concept, was lost by the Petitioners and their class. To the extent that the physical injuries caused some students to miss school, those students lost property rights as surely as did the students in *Goss v. Lopez*, 419 U.S. 565 (1975). The threatened loss of those rights activates the protections of the Due Process Clause.

B. The District Court and the *en banc* majority were wrong in viewing due process procedures in a school setting as having to be "elaborate" or "formal." The minimal, informal requirements for notice and an opportunity to be heard outlined in *Goss v. Lopez*, 419 U.S. 565 (1975), are sufficient to protect students faced with corporal punishment by an instrument. The Dade County School Board Policy and an Opinion of the Attorney General of Florida already envision some delay between the offense and punishment. The School Board mandates an effort to analyze the effectiveness of the punishment and to consult with psychologists or physicians (App. 130, 132). Attorney General's Opinion 074-256 states that a teacher must consult with a principal before corporal punishment is imposed. Within that time, providing informal notice of the reasons for

the threatened punishment and an opportunity to be heard are reasonable due process requirements which will not disrupt school functions.

### III.

#### NEITHER THE AVAILABILITY OF STATE REMEDIES, NOR *PAUL V. DAVIS*, \_\_\_\_ U.S. \_\_\_\_ (1976), BARS RELIEF IN THIS CASE.

*Monroe v. Pape*, 365 U.S. 167, 183 (1961), makes it clear that when one is claiming a denial of a specific constitutional right, state remedies need not be invoked. The Petitioners in this case are claiming denials of rights explicitly protected by the Fourth and Eighth Amendments. Therefore, they come within the scope of the *Monroe v. Pape* doctrine.

In *Paul v. Davis*, \_\_\_\_ U.S. \_\_\_\_ 47 L.Ed.2d 405 (1976), no fundamental constitutional rights were involved. Davis' claim was based on an alleged loss of liberty (his interest in not being defamed) absent a hearing. But there is no specific constitutional prohibition against defamation. There are such prohibitions against cruel and unusual punishment and the right to physical integrity. Therefore, *Monroe v. Pape*, not *Paul v. Davis*, controls the Petitioners' right to demand federal relief for the deprivation of their constitutional rights by persons acting under color of state law.



## ARGUMENT

### I.

#### THE INFLICTION OF SEVERE CORPORAL PUNISHMENT UPON PUBLIC SCHOOL STUDENTS VIOLATES THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

##### A. The Eighth Amendment Applies to Public School Students Punished By School Officials.

We begin with this principle:

In our system, State-invented schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over children. Students in school as well as out of school are "persons" under the Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.

*Tinker v. Des Moines School District*, 393 U.S. 503, 511 (1969).

One of the fundamental rights which the State must respect is the Eighth Amendment's prohibition against the infliction of "cruel and unusual punishments." *Robinson v. California*, 370 U.S. 660 (1962); *Gregg v. Georgia*, \_\_\_\_ U.S. \_\_\_\_, 44 L.W. 5230 (July 2, 1976). Entering the "schoolhouse door" does not strip students of their constitutional rights, *Goss v. Lopez*, 419 U.S. 565, 574 (1974), for the Fourteenth Amendment protects them, like every citizen, against

the State and all of its creatures—"Boards of Education not excepted." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943).

However, the Court below refused to offer students Eighth Amendment protection under any circumstances, concluding that the Amendment's application was limited to punishment invoked as a sanction for criminal conduct and was inapplicable to corporal punishment inflicted in public schools. That decision created this anomalistic result: public school children may be savagely beaten and whipped by teachers acting under color of state law, yet they will have no constitutional redress. But hardened criminals suffering the same beatings at the hands of their jailers will have constitutional claims. Neither the Constitution nor common sense condones that conclusion.

"The history of the [cruel and unusual] clause establishes that it was intended to prohibit cruel punishments." *Furman v. Georgia*, 408 U.S. 238, 322 (1972) (Marshall, J., concurring). With one exception, *Trop v. Dulles*, 356 U.S. 86 (1958), the Court's review of Eighth Amendment claims has come in cases involving punishment imposed by the criminal justice system. *Gregg v. Georgia*, \_\_\_\_ U.S. \_\_\_\_, 44 L.W. 5230 (July 2, 1976); *Furman v. Georgia*, 408 U.S. 238 (1972); *Robinson v. California*, 370 U.S. 660 (1962); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *Weems v. United States*, 217 U.S. 349 (1910); *In re Kemmler*, 136 U.S. 436 (1890); *Wilkerson v. Utah*, 99 U.S. 130 (1879). But that does not mean that the Eighth Amendment offers no protection to those punished by other state authorities.

The sketchy history of the cruel and unusual punishment clause's enactment indicates it was aimed at proscribing torture and barbarous methods to force confessions and punish crimes. Granucci, "Nor Cruel and Unusual Punishments Inflicted": *The Original Meaning*, 57 Cal.L.Rev. 839, 842 (1969). The drafters could not have envisioned the expansion of governmental services and regulations giving rise to opportunities for punishments unknown in 1791. They could not have known that a century and a half later this Court would recognize that "education is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 347 U.S. 483, 493 (1954). It was not until the mid-1800's that the framework of our present public education system was born, long after the clause was incorporated into the Constitution. 7 Encyclopedia Britannica, *History of Education*, 991, 992 (1970). So it is impossible to say, as did the opinion below, that the proponents of the clause ruled out the rack and screw for criminals but not for schoolchildren. That position ignores the dynamic approach this Court has taken in interpreting the Eighth Amendment:

... a principle to be vital must be capable of wider application than the mischief which gave it birth.

*Weems v. United States*, 217 U.S. 349, 373 (1910).

The Court's decisions reflect that precept. "Thus the clause forbidding 'cruel and unusual' punishments is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane

justice." *Gregg v. Georgia*, \_\_\_\_ U.S. \_\_\_\_, 44 L.W. at 5235, citing *Furman v. Georgia*, 408 U.S. at 429-430 (Powell, J., dissenting); *Trop v. Dulles*, 356 U.S. 86, 100-101 (plurality opinion).

In *Trop v. Dulles*, the Court found that stripping a convicted Army deserter of his citizenship, pursuant to Section 401(g) of the Nationality Act of 1940, was a penal act barred by the cruel and unusual punishment clause. Trop had been found guilty of desertion in 1944, sentenced to three years at hard labor, a dishonorable discharge and forfeiture of all pay. In 1952 he was denied a passport because of his conviction for wartime desertion. He instituted an action seeking a declaratory judgment that he was a citizen. *Id.* 356 U.S. at 88. In order to determine if the Eighth Amendment applied, the Court first had to decide if the statute withholding citizenship was "penal." Trop had already served his court martial sentence. The citizenship denial was imposed by "civil" authorities. The Court set this standard for determining "penal":

If the statute imposes a disability for the purposes of punishment—that is to reprimand the wrongdoer, to deter others, etc., it has been considered penal.

*Id.*, 365 at 96.

A second criteria hinged upon the statute "prescrib[ing] the consequence that will befall one who fails to abide" by its regulatory provisions.

By finding the sanction of Section 401(g) to be penal, and deciding that the punishment, though involving no physical mistreatment or torture, offended



the Eighth Amendment, the Court rejected the kind of static scope which the Court of Appeals applied in this case.

The punishment meted out to the Petitioners and their class was certainly "penal." The School Board Policy described it as the "inflicting of a penalty for an offense." (App. 126). Attaching a "criminal" or "civil" label is meaningless. Cf. *In re Gault*, 387 U.S. 1, 17 (1969). The fallaciousness of such a distinction is understood by the fact that some of the most grievous paddling befell one student (Reginald Bloom) who received fifty licks for allegedly making an obscene telephone call (Tr. 501, 509, 525). Obscene calls are misdemeanor violations under Florida Statutes Section 365.16. Bloom was punished by state authority for that offense in a way which would have been unconstitutional had he been convicted of the crime. Compare, *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), in which ten lashes with a strap were deemed to exceed Eighth Amendment tolerances:

... we have no difficulty in reaching the conclusion that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment; that the strap's use, irrespective of any precautionary conditions which may be imposed, offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to possess; and that it also violates those standards of good conscience and fundamental fairness enunciated by this court in the *Carey* and *Lee* cases.

*Id.* 404 F.2d at 579.

Yet the decision below mandates the constitutional incongruity of Reginald Bloom receiving five times the punishment of the Arkansas prisoners without any of their constitutional protections.<sup>5</sup> The Eighth Circuit, in *Bramlett v. Wilson*, 495 F.2d 714, 717 (8th Cir. 1974), rejected that position, finding that "an excessive amount of physical punishment could be held to be cruel and unusual punishment." The Seventh Circuit also rejected it. *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974). While *Nelson* involved corporal punishment used in a state correctional school, one-third of whose students were non-criminal offenders, the court drew no distinction between the residents when it decided that the Eighth Amendment offered protection against severe corporal punishment. Several other federal courts have assumed, without deciding, that the Eighth Amendment applies to the imposition of corporal punishment in public schools. *Baker v. Owen*, 395 F. Supp. 294 (M.D. N.C. 1975), *aff'd* \_\_\_\_ U.S. \_\_\_\_, 96 S.Ct. 210 (1975); *Glaser v. Marietta*, 351 F. Supp. 555 (W.D. Pa. 1972); *Ware v. Estes*, 328 F. Supp. 657 (N.D. Tex. 1971), *aff'd per curiam* 458 F.2d 1360 (5th Cir. 1972); *Whatley v. Pike County Board of Education*, Civil Action No. 977 (N.D. Ga. 1971) (three-judge

<sup>5</sup>Cf. *In re Gault*, 387 U.S. 1, 47 (1967): "It would indeed be surprising if the privilege against self-incrimination were available to hardened criminals, but not to children." The ironies abound. Before Gerald Gault could receive *any* punishment for the obscene telephone call he allegedly made, he was held to be entitled to counsel, notice of the charges and an opportunity to confront his accuser. However, Reginald Bloom received summary punishment at the hands of the school authorities. Punishment which was undeserved since another boy later confessed to making the call (Tr. 503-504).

court); *Sims v. Board of Education*, 329 F. Supp. 678 (D. N.M. 1971); and *Roberts v. Way*, 398 F. Supp. 856 (D. Vt. 1975).<sup>6</sup>

The assumption of those courts is correct. Over one hundred years ago the Supreme Court of Indiana declared:

The public seem to cling to the despotism in the government of schools which has been discarded everywhere else. . . . The husband can no longer moderately chastise his wife; nor . . . the master his servant or apprentice. Even the degrading cruelties of the naval service have been arrested. Why the person of the schoolboy . . . should be less sacred in the eye of the law than that of the apprentice or the sailor, is not easily explained.

*Cooper v. McJunkin*, 4 Ind. 290, 291, 293 (1853).

The Fifth Circuit's absolute exclusion of public school students from constitutional protection against any barbarity is inexplicable. It is not supported by history, logic or precedent. Since the Eighth Amendment must offer *some* protection to the Petitioners, the issue to be resolved is whether the punishment applied in this case exceeds that which is tolerable under the cruel and unusual clause.

<sup>6</sup>Two courts have held that the Eighth Amendment does not apply to corporal punishment in public schools. *Sims v. Waln*, 388 F.Supp. 543 (S.D. Ohio 1974), aff'd \_\_\_\_ F.2d \_\_\_\_ (6th Cir., June 15, 1976), and *Gonyaw v. Gray* 361 F.Supp. 366 (D. Vt. 1973).

## B. The Severe Corporal Punishment Applied in This Case Violated the Contemporary Values Test of the Eighth Amendment.

In order to determine if a punishment is cruel and unusual, the Court has assessed "contemporary values concerning the infliction of a challenged sanction," looking to "objective indicia that reflect the public attitude toward a given sanction." *Gregg v. Georgia*, \_\_\_\_ U.S. \_\_\_\_, 44 L.W. at 5235.

While this case involves the imposition of *severe* corporal punishment,<sup>7</sup> we first consider the public tolerance for any corporal punishments imposed upon public school students as measured by legislative pronouncements which reflect the particular jurisdiction's "moral consensus" concerning such punishment and its "social utility as a sanction." *Id.* 44 L.W. at 5240.

Only ten states specifically permit corporal punishment.<sup>8</sup> At least twenty-three states give teachers the same authority as a parent to discipline a child, or authorize the teacher to maintain order and discipline

<sup>7</sup>The definition of "severe" is drawn from the facts of this case. It means the repeated and continued infliction of bodily pain by an instrument designed to cause such pain.

<sup>8</sup>The 1972 National Education Association "Report of the Task Force on Corporal Punishment," p. 24-A, notes, without listing the states, that thirteen states specifically permit corporal punishment. Our research has discovered these ten specific corporal punishment statutes: Cal. Educ. Code §10854 (West 1975); Del. Code Ann., ch. 14 §701 (1974); Fla. Stat. Ann. ch. 232 §27 (1961); Ga. Code Ann. ch. 32 §835 (1976); Md. Code Ann. ch. 77 §98B (1976); Nev. Rev. Stat. Ann. ch. 392 §465 (1976); Ohio Rev. Code Ann. ch. 3319 §41 (1962); S.C. Laws Ann. ch. 21 §776 (Cum. Supp. 1975); Vt. Stat. Ann. ch. 16 §1161 (1971); Vr. Code Ann. ch. 22 §231.1 (1974).



in the classroom.<sup>9</sup> Two states expressly prohibit corporal punishment in public schools.<sup>10</sup> Some large city school boards have, by local rule, banned it. See National Education Association "Report of the Task Force on Corporal Punishment," p. 25-A (1972).

Thus, unlike the clear legislative endorsement of capital punishment by at least thirty-five states and the United States, *Gregg v. Georgia*, \_\_\_\_ U.S. \_\_\_\_ 44 L.W. at 5237-5238, n. 23 and 24, the public seems ambivalent about *any* corporal punishment imposed upon students.

There can be no dispute, however, that society is totally unaccepting of *severe* corporal punishment inflicted upon public school children. No statute or rule authorizes the kind of punishment endured by the

<sup>9</sup> Ala. Code Ann. ch. 52 §1(9) (1973); Ariz. Rev. Stat. Ann. ch. 15 §201 (1974); Ark. Stat. Ann. ch. 80 §1629 (1967); Conn. Gen. Stat. Ann. ch. 53a §18 (1972); Hawaii Rev. Stat. Ann. ch. 298 §16 (Supp. 1975); Idaho Code Ann. ch. 33 §1224 (1948); Ill. Ann. Stat. ch. 122 §24-8 (1971); Ind. Stat. Ann. tit. 20 art. 8.1 ch. 5 §1 (1974); Ky. Rev. Stat. Ann. ch. 161 §180 (1969); La. Stat. Ann. ch. 17 §223 (1965); Me. Rev. Stat. Ann. tit. 20 ch. 105 §911-915 (1965); Mich. Stat. Ann. ch. 340 §756 (1972); Neb. Rev. Stat. Ann. ch. 79 §311 (1964); N.Y. Penal Law §35.10 (McKinney 1975); N.C. Gen. Stat. Ann. ch. 115 §146 (1972); Okla. Stat. Ann. ch. 6 §114 (1969); Ore. Stat. Ann. ch. 161 §205; Pa. Stat. Ann. tit. 24 ch. 13 §1317 (Supp. 1976); S.D. Com. Laws Ann. ch. 13 §32-2 (1967); Tex. Codes Ann. Penal Code §9.62 (1974); Wash. Rev. Code Ann. tit. 9 ch. 11 §040 (1961); W.Va. Code Ann. ch. 18A §5-1 (1975); Wyo. Stat. Ann. ch. 21.1-64 (Supp. 1973).

<sup>10</sup> Mass. Ann. Laws, Ch. 71, §37G (Supp. 1974); N.J. Stat. Ann., §18A: 6-1 (1968).

Petitioners and their class.<sup>11</sup> No legislature has authorized the imposition of penalties like twenty brutally hard strokes with a paddle for tardiness in leaving a school auditorium (App. 72-74); or the mass paddling of fifteen boys in a bathroom for being late to class or other minor transgressions (App. 107-110); or constant paddling for sitting in the wrong auditorium seat (Tr. 819). Those penalties are both inhumane and disproportionate to the offenses involved. The record in this case is replete with instances of conduct which

<sup>11</sup> Florida Statute Section 231.09(3) admonishes teachers to: Treat pupils under their care kindly, considerately, and humanely, administering discipline in accordance with regulations of the state board and the school board; provided, that in no case shall cruel or inhuman punishment be administered to any child attending the public schools.

As one commentator has pointed out:

... the right of the teacher to administer punishment for the preservation of order and discipline in the school is undoubted under the common law but whether the necessity for the punishment existed and whether the mode and degree of punishment were reasonable are questions for the trier of facts to decide.

Proehl, *Tort Liability of Teachers*, 12 Vand. L. Rev. 723, 737 (1959) (footnote omitted).

The use of excessive force in punishing a student could give rise to state civil and criminal litigation against the teacher. The availability of those remedies does not obviate a constitutional claim. *Monroe v. Pape*, 365 U.S. 167, 183 (1961):

It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy and the latter need not be first sought and refused before the federal one is invoked.

Because we anticipate that the Respondents will make an "adequate state remedy" argument, we treat this point more fully in Point III, *infra*. It is enough to say here that severe corporal punishment is beyond the pale of contemporary values.

violates the standards of decency tolerated by society. Beatings requiring medical treatment (App. 133) and causing the injured person to be unable to sit comfortably for three weeks (Tr. 149, 509), or to miss school for two weeks with an injured hand (Tr. 519-520), would be obnoxious to societal values even if inflicted by a parent.

For example, see Florida Statutes Section 827.03(3), which makes malicious punishment of a child a second degree felony, and Section 827.07, which defines "abuse" to include "any willful or negligent acts which result in . . . unreasonable physical injury" to children. Those statutes are part of a nationwide movement to protect the young from abuse by all adults, including their parents. It is obvious that the "*in loco parentis*" concept, which has provided the historical authority for teachers to impose some punishment, offers no protection to a teacher for acts which exceed parental authority.<sup>12</sup>

<sup>12</sup>The common law doctrine of *in loco parentis* recognized a partial delegation of parental authority to the teacher. 1 *Blackstone Commentaries on the Laws of England*, 453 (T. Cooley ed. 1884). But the theory has limitations. The doctrine:

"... was enunciated by Blackstone at a time when a child had one tutor. The tutor could logically be considered as acting in place of the parent, because the parent selected him and expected him to have a long and close relationship with the child. Far from delegating their authority to the schools, parents now are required by law to send their children to school, whether they want to or not. And the teacher no longer has a close extended relationship with the individual child. In addition to being based on an obsolete relationship, *in loco parentis* has become a ra-

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But more importantly, when a teacher, acting under color of state law, inflicts severe punishment, that penalty is being imposed by the state itself. A constitutional inquiry is triggered, requiring the assessment of contemporary values. *Gregg v. Georgia, supra*. While it may be premature to conclude that *all* corporal punishment violates those values, it is apparent that the repeated and continued infliction of bodily pain upon thirteen, fourteen and fifteen-year-old children surpasses contemporarily tolerated notions of punishment. The Respondents inflicted that kind of punishment upon the students at Drew Junior High School. It was arbitrary, capricious and wantonly and freakishly imposed. Cf. *Furman v. Georgia*, 408 U.S. 238, 309-310. It was cruel and unusual and violated the Eighth Amendment.<sup>13</sup>

(footnote continued from preceding page)

tionale for actually curtailing the right of parents to make decisions about their children. In many cases, parents have brought suit against schools that were acting "in their place" but against their wishes. Gradually, *in loco parentis* is being replaced by state statutes and Constitutional principles as guides for the school's treatment of children.

"Report of the Task Force on Corporal Punishment," National Education Association, 24-A (1972).

<sup>13</sup>The difficulty inherent in tolerating any corporal punishment was addressed in *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968):

We are not convinced that any rule or regulation as to the use of the strap, however seriously or sincerely conceived and drawn, will successfully prevent abuse. . . . Rules in this area seem often to go unobserved. . . . Regulations are easily circumvented. . . . Corporal punishment is easily subject to abuse in the hands of the sadistic and the unscrupulous. . . . Where power to punish is granted to

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**C. The Severe Corporal Punishment Inflicted Upon the Petitioners Violated the Concept of Human Dignity Embodied in the Eighth Amendment.**

In addition to violating "public perceptions of standards of decency," *Gregg v. Georgia*, 44 L.W. at 5235, the punishment used in this case was also contrary to other Eighth Amendment review standards:

A penalty also must accord with "the dignity of man," which is the "basic concept underlying the Eighth Amendment." *Trop v. Dulles*, *supra*, at 100 (plurality opinion). This means, at least, that the punishment not be "excessive."

*Id.* 44 L.W. at 5236.

(footnote continued from preceding page)

persons in lower levels of administrative authority, there is an inherent and natural difficulty in enforcing the limitations of that power.... There can be no argument that excessive whipping or too great frequency of whipping or the use of studded or overlong straps all constitute cruel and unusual punishment. But if whipping were to be authorized, how does one, or any court, ascertain the point which would distinguish the permissible from that which is cruel and unusual?

*Id.* 404 F.2d at 579-580.

These arguments strongly support a total ban on corporal punishment as the only effective way of insuring Eighth Amendment protections. See also 6 Harv. Civ. Rights-Civ. Lib. L. Rev., *Corporal Punishment in the Public Schools*, 583, 585 (1971):

While theoretically corporal punishment need not be brutal, there is no assurance that it will be inflicted moderately or responsibly. In the heat of anger, especially if provoked by personal abuse, some teachers are likely to exceed legal bounds. Moreover, if limited corporal punishment were

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The excessiveness which concerned the English framers of the original cruel and unusual punishment clause reflected their

...objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court and ... a reiteration of the English policy against disproportionate penalties.

Granucci, "Nor Cruel and Unusual Punishments Inflicted": *The Original Meaning*, 57 Cal.L.Rev. 839, 865 (1969).

The punishment of the sentencing court at Drew Junior High School was prohibited by Florida Statutes Section 231.09(3), outlawing "cruel and inhuman punishment" in the public schools. It was also disproportionate. The argument is made stronger by analyzing the penalties imposed at Drew Junior High School under the "excessiveness" criteria set forth in *Gregg v. Georgia*:

First, the punishment must not involve the unnecessary and wanton infliction of pain. *Furman v. Georgia*, *supra*, at 392-393 (Burger, C.J., dissenting). See *Wilkerson v. Utah*, 99 U.S., at 136; *Weems v. United States*, 217 U.S., at 381. Second,

(footnote continued from preceding page)

permitted, controls would be unlikely to prevent the "really unmistakable kind of satisfaction which some teachers feel in applying the rattan."<sup>19</sup> A total ban of this punishment would provide far more effective control.<sup>20</sup>

<sup>19</sup>J. Kozol, *Death at an Early Age*, 16-17 (1967).

<sup>20</sup>A rule forbidding all corporal punishment would probably receive more compliance than the common law principles because all parties involved are more likely to be aware of it and conscious of any violation. This would likely be reinforced by the added case of convicting a violator, simply by holding the school official involved in contempt of a court order, where injunctive relief is obtained.

the punishment must not be grossly out of proportion to the severity of the crime. *Trop v. Dulles*, *supra*, at 100 (plurality opinion) (dictum); *Weems v. United States*, *supra*, at 367.

*Id.* 44 L.W. at 5236.

We begin with the proposition that:

Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.

*Trop v. Dulles*, 356 U.S. at 100.

In a school setting, "Suspensions are one of the traditional means—ranging from keeping a student after class to permanent expulsion—used to maintain discipline in the schools." *Goss v. Lopez*, 419 U.S. 565 at 591 (Powell, J., dissenting). Thus, it is non-physical punishment which is customarily imposed. Even if some of the alleged offenses which precipitated the beatings at Drew (Reginald Bloom's alleged obscene phone call, for instance) had been tried in criminal or juvenile court, they could have resulted only in the non-physical penalties of fine or imprisonment. Corporal punishment in either the school or the criminal justice system would be non-traditional. But even if we stretch the point of tradition a bit to embrace some corporal punishment, in deference to the Respondents' concession that "corporal punishment in the public schools of Dade County, Florida is a last resort means as an alternative to suspension or expulsion. . . ." (Brief of Respondents in Court of Appeals, p. 17, 498 F.2d at 267; 525 F.2d at 925), nothing supports the notion that severe corporal punishment is traditional.

Severe corporal punishment is an extreme sanction, justified only for some extreme offense, if it is permissible at all. To determine whether it may be licensed, we look to the death penalty cases. Since capital punishment is the ultimate form of corporal punishment, the circumstances which authorize the death penalty shed light on what, if anything, allows the imposition of severe corporal punishment upon youngsters.

The Court noted in *Gregg* that "the sanction cannot be so totally without penalogical justification that it results in the gratuitous infliction of suffering." It concluded in the death penalty cases<sup>14</sup>:

... we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes.

*Gregg v. Georgia*, 44 L.W. at 5240 (footnote omitted).

In other words, the infliction of the extreme version of corporal punishment was tolerable because it punished the commission of the ultimate atrocity—murder. Therefore, the suffering was not gratuitous. It served a valid societal purpose.

Corporal punishment in any other form is, according to *Trop v. Dulles*, "constitutionally suspect." To justify its imposition, the state must show a "compelling

<sup>14</sup>*Gregg v. Georgia*, \_\_\_\_ U.S. \_\_\_\_ (1976); *Profitt v. Florida*, \_\_\_\_ U.S. \_\_\_\_ (1976); *Jurek v. Texas*, \_\_\_\_ U.S. \_\_\_\_ (1976); *Woodson v. North Carolina*, \_\_\_\_ U.S. \_\_\_\_ (1976); *Roberts v. Louisiana*, \_\_\_\_ U.S. \_\_\_\_ (1976).



[societal] interest." Cf. *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Oyama v. California*, 322 U.S. 633, 644-646 (1948); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1968).<sup>15</sup>

Can there be any governmental interest rationalizing the corporal punishment procedures utilized at Drew Junior High School? According to the School Board Policy, any corporal punishment is a "penalty" which attempts to maintain discipline by "changing the behavior of the student" (App. 126). There is evidence that it accomplishes none of those goals:

I can't think of a renowned or leading authority in psychology, educational psychology, educational research, psychiatry who advocates corporal punishment in schools.

Testimony of Dr. Scott Kester (Tr. 756, 766-767).

The National Education Association "Task Force Report on Corporal Punishment" concludes, *inter alia*, that it is an inefficient way to maintain order; that it may increase disruptive behavior; that it hinders learning. After examining "all the reasons it could identify for the use of corporal punishment in both oral and written materials," the Task Force found "that the weight of fact and reasoning was against the infliction

<sup>15</sup>Those cases impose the compelling interest test upon classifications based on race or national origin or those which infringe upon fundamental constitutional rights. Since the Eighth Amendment is such a right, and since the classification here (corporal punishment) has been viewed as "non-traditional" and "suspect," we contend the compelling interest test must be similarly applied in this context.

Even if the lesser "rational basis" test is applied, the repeated beatings which form the basis of this constitutional claim do not pass constitutional muster.

of physical pain as an attempt to maintain an orderly learning climate." Report, *supra*, at p. 7-A.<sup>16</sup>

Even if we assume that there is some valid reason to paddle, certainly the repeated whippings of Ingraham, Andrews, Bloom and the other Drew students was more than retribution, more than they "deserved." Cf. *Furman v. Georgia*, 408 U.S. at 308 (Stewart, J., concurring). Nor can one say that only such harsh measures would deter future misconduct or maintain discipline. That argument is specious in light of the fact that innocent conduct, more than culpable conduct, prompted the harsh vengeance of the school administration.<sup>17</sup>

The repeated and continued imposition of bodily pain upon the Petitioners and their class was totally without penalogical or educational justification. It resulted in the gratuitous infliction of suffering. No societal purpose was served. This Court made it clear that even for the most heinous violation of a social norm, an extraordinary punishment must be shown to accomplish its task of promoting stability in a society governed by law. *Gregg v. Georgia, supra*. There can be

<sup>16</sup>We are not concerned here with the need to use physical force to protect person or property from imminent harm. That force is not "punishment" and its utility is recognized by all educators. See "Model Law Outlawing Corporal Punishment," "Report of the Task Force on Corporal Punishment," National Education Association, 29-A (1972).

<sup>17</sup>Among the most distressing examples were the beatings inflicted for not dressing properly for gym because the student's gym shorts had been stolen (Tr. 493-494). No amount of paddling could cure that violation of the school dress code. The undressed student became a double victim. His shorts were lost and his buttocks assaulted. Even if a student was too poor to afford the proper clothing, he was paddled (App. 102-103; Tr. 546-548, 588-591).

no such showing in this case. Therefore, the severe corporal punishment inflicted upon these Petitioners and their class violated the Eighth Amendment.<sup>18</sup>

## II.

### THE INFLICTION OF SEVERE CORPORAL PUNISHMENT UPON PUBLIC SCHOOL STUDENTS ABSENT NOTICE OF THE CHARGES FOR WHICH PUNISHMENT IS TO BE INFLICTED AND SOME OPPORTUNITY TO BE HEARD VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

#### A. The Protected Right.

In *Goss v. Lopez*, 419 U.S. 565 (1975), the Court held that an Ohio Statute which authorized suspension of public school students for up to ten days, without notice of their alleged offenses and an opportunity to be heard, violated the students' rights to procedural due process under the Fourteenth Amendment. The Court found that the students had a substantial property right

<sup>18</sup>Since the repeated and continued infliction of bodily pain by an instrument designed to cause such pain is *per se* unconstitutional, we need not address the lack of standards governing the imposition of corporal punishment. Neither the School Board Policy nor the Florida Statute offer directions which suitably direct and limit the instances of any corporal punishment, other than the Board requirement that it be administered with "kindness" (App. 129) and the statutory prohibition against "cruel and inhuman" treatment. Florida Statute Section 231.09(3). Those failures would raise serious questions under *Furman v. Georgia*. See *Gregg v. Georgia*, 44 L.W. at 5240.

to their education and that the right could not be withdrawn, even temporarily, absent minimal due process protections.

The right involved in this case is the right to liberty. While the right has not been defined with exactness:

In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499-500; *Stanley v. Illinois*, 405 U.S. 645.

*Board of Regents v. Roth*, 408 U.S. 564, 572 (1972).

Without doubt it denotes not merely freedom from bodily restraint but also the right of the individual... generally to enjoy those privileges long recognized... as essential to the orderly pursuit of happiness by free men.

*Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

The right to be free from unjustified physical assaults fits that definition. The liberty which was lost by the Petitioners is so basic to our society that the Fourth Amendment is its principal guarantor. In *Schmerber v. California*, 384 U.S. 757, the Court declared:

The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the state.

*Id.* 384 U.S. at 767.

And in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court said:

Even a limited search of the outer clothing for weapons constitutes a severe, though brief intrusion upon cherished personal security and it must surely be an annoying frightening and perhaps humiliating experience.

*Id.* 392 U.S. at 24-25.



The intrusions upon the physical integrity of the Drew Junior High School students were severe, annoying, frightening and humiliating.<sup>19</sup> "Liberty," as a broad concept, or as a Fourth Amendment concept, is certainly the right which was lost by the Petitioners and their class. Cf. *Baker v. Owen*, 395 F. Supp. 294, 301 (M.D. N.C.) (three-judge court), aff'd — U.S. —, 96 S.Ct. 210 (1975).

The decision below refused to view the Petitioners' claims as ones involving liberty. Instead, the Court concluded that paddling involved no "deprivation of a property interest or denial of a claim to education" and called paddling "a much less serious event in the life of a child than . . . a suspension. . . ." *Ingraham v. Wright*, 525 F.2d at 919 (App. 189). The Court applied "the 'grievous loss' standard" to the facts and concluded that the paddlings at Drew did not subject students to a "grievous loss" for which constitutionally mandated

<sup>19</sup>The definition of "severe" corporal punishment in a due process context differs slightly from "severe" in an Eighth Amendment sense. See note 7, *supra*. Obviously, the excessive conduct which is the subject of that argument cannot be legitimized by a prior hearing.

In the due process sense, "severe" corporal punishment means the infliction of bodily pain by an instrument designed to cause such pain. That definition is drawn from the facts of this case. We do not include a brief hand spanking or a slapped face within the definition of "severe" corporal punishment. But one "lick" with a paddle, an instrument designed for the purpose of causing pain, is "a severe though brief intrusion upon cherished personal security." Cf. *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968).

procedural safeguards apply. *Id.* 525 F.2d at 918, n. 10.<sup>20</sup> (App. 188).

The erroneousness of that conclusion is immediately apparent when one considers James Ingraham's case. Had he been suspended for a "week and a few days" (App. 79) instead of being driven from school by Mr. Wright's paddle, he would have been entitled to *Goss v. Lopez* due process hearing procedures. The paddling of Ingraham involved both a property and a liberty interest. Under the "property" test of *Goss v. Lopez*, Ingraham's loss of schooling reached constitutional proportions. An examination of the extent of the losses of liberty incurred by both Petitioners and their class makes it clear that those deprivations were grievous and substantial.<sup>21</sup> Since the dissent to *Goss v. Lopez* characterized suspensions as *de minimus*, we utilize the reasons for that assessment in making our comparison. In *Goss*, Justice Powell noted:

<sup>20</sup>The "grievous loss" test has no place here for several reasons. First, the interest asserted by the Petitioners primarily involves liberty, not property, and secondly, even if only property rights were involved, the amount of loss is relevant only to the timing and nature of the hearing. "As long as a property deprivation is not *de minimus*," its gravity is irrelevant to the question of whether account must be taken of the Due Process Clause. *Goss v. Lopez*, 419 U.S. 565, at 575-576. But, as we argue *infra*, under any test, the liberty and property rights lost by the Petitioners merit due process protection.

<sup>21</sup>While we have focused upon the physical integrity guaranteed by "liberty," the psychological harm caused by severe corporal punishment adds to the weight of the loss. The District Court's Order of Dismissal stated: "After having heard the testimony in this case, this Court believes that corporal punishment may be administered in such a way that the resultant psychological harm to some students will be substantial and lasting." The

For average, normal children—the vast majority—suspension for a few days is simply not a detriment; it is a commonplace occurrence, with some 10% of all students being suspended; it leaves no scars; affects no reputations; indeed, it often may be viewed by the young as a badge of some distinction and a welcome holiday.

*Goss v. Lopez*, 419 U.S. at 598, n. 19 (Powell, J., dissenting).

No one welcomed being paddled at Drew Junior High School. Roosevelt Andrews' testimony about the bathroom paddling of fourteen or fifteen boys by Mr. Barnes makes that clear:

Q Do you remember how many licks he gave?

A All different kinds of licks. I mean all different kinds in numbers.

(footnote continued from preceding page)

original Court of Appeals panel decision summed up the testimony of one expert witness on the subject:

Dr. Scott Kester, an assistant professor of educational psychology at the University of Miami, testified that corporal punishment could damage a child's development by engendering anxiety, frustration, and hostility, or by causing sheer pathological withdrawal or hatred of the school environment. He further commented that since children model their behavior after adults, a child who is corporally punished may learn from this that physical force is an appropriate way in which to handle conflicts. Dr. Kester emphasized that the child who is corporally punished often becomes more aggressive and more hostile than he was prior to his punishment.

498 F.2d at 264. (App. 172.) See Transcript, pp. 668-769.

Another dimension of the liberty lost by the Petitioners and their class arises from the public nature of the paddlings. For example, Janice Dean's paddling, imposed before 300 students on her first day in school (Tr. 815-816) certainly involves a loss of reputation, honor and integrity amounting to a denial of liberty. *Goss v. Lopez*, 419 U.S. at 574.

Q Did they say anything?

A Yeah, they say something.

Q What did they say?

A All kinds of stuff. They say—some of them hollering, cry, prayed, and everything else.

(App. 109).

James Ingraham's reputation among his brothers and sisters was long affected by his beating:

Q Did you tell anybody about it? Did anybody find out about it; any of your friends?

A No.

Q How about your brothers and sisters; did they know about it?

A Yeah.

Q What did they say about it?

A Called me "rain bummy".

Q Was that in reference to your buttocks?

A Yeah.

Q Were they making fun of you?

A Yeah.

Q How did you feel about that?

A I plugged them in their face.

Q You were angry about that?

A Yes.

Q How long did that go on?

A Still going on now.

(App. 79).

Ingraham's scar is visibly before the Court (App. 140). The District Court Judge, observing Daniel Lee's hand, which had been struck by Barnes, commented:



"It seems to me to be disfigured, a portion of his right knuckle is enlarged to some degree" (Tr. 483). Roosevelt Andrews' wrist was immobilized for a week (Tr. 307).

Finally, it cannot be said, except for Drew Junior High School, that severe corporal punishment in Dade County Schools was a common occurrence.

These facts undermine the theory that paddling at Drew was a "commonplace and trivial event in the lives of most children." *Ingraham v. Wright*, 525 F.2d at 919. (App. 189). Whatever label one may place on the right to human dignity, one cannot call these assaults on that dignity *de minimus*. They were not "speculative and subjective," *Goss v. Lopez*, 419 U.S. at 598 (Powell, J., dissenting). They were serious, real and objectively assessed by medical records (App. 133-139). If "liberty" means anything, it means that such punishment triggers the protection of the Due Process Clause.

#### B. The Due Process Which Should Be Applied.

"Once it is determined that due process applies, the question remains what process is due." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). *Goss v. Lopez* noted the flexible nature of due process procedures and recognized the sensitivities surrounding their application to school settings. 419 U.S. at 577-578. The Court's analysis is so apt to the need for hearings in corporal punishment situations that we set it forth verbatim. Substitute severe corporal punishment for "suspension" and the analogy is complete:

The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinary, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device. The prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern, and many school authorities may well prefer to untrammelled power to act unilaterally, unhampered by rules about notice and hearing. But it would be a strange disciplinary system in an educational institution if no communication was sought by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure

that an injustice is not done. "[F]airness can rarely be obtained by secret, one-sided determination of acts decisive of rights. . . ." "Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Committee v. McGrath*, supra, at 170, 171-172, 95 L.Ed. 817 (Frankfurter, J., concurring).

*Id.* 419 U.S. at 579-580.

Unlike an improper suspension, erroneous corporal punishment cannot be undone. Therefore, we deem it essential that *some* opportunity to be heard precede the infliction of bodily pain by an instrument designed to cause such pain. The error of both the majority *en banc* decision and the District Court was that they envisioned a very rigid process. The district judge wrote:

It seems to this Court that if there is any good purpose to be served by corporal punishment in the schools, such purpose would be long since passed if *formal* notice and hearing were required before a paddling.

(App. 156) (Emphasis supplied).

The *en banc* decision stated:

It seems to us that the value of corporal punishment would be severely diluted by *elaborate* procedural process imposed by this court.

*Ingraham v. Wright*, 525 F.2d at 919 (App. 189) (Emphasis supplied, footnote omitted).

But due process is not necessarily so elaborate or formal. "[T]he timing and the nature of the hearing

will depend on appropriate accommodation of the competing interests involved." *Goss v. Lopez*, 419 U.S. at 579, citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, at 895 (1961).

The original Fifth Circuit panel decision and the opinions of three-judge courts in *Whatley v. Pike County Board of Education*, No. 977 (N.D. Ga. 1971) (unreported), and *Baker v. Owen*, 395 F. Supp. 294 (M.D. N.C. 1975) aff'd \_\_\_\_ U.S. \_\_\_\_, 96 S.Ct. 210 (1975), struck the proper balance.

The *Baker* court considered the matter carefully and decided that a student must be "informed beforehand that specific misbehavior" could result in corporal punishment and that the student must be given some opportunity to tell his side of the story. *Id.* 395 F. Supp. at 302.

The *Whatley* court required that "the student know and understand the rule under which he is to be punished," and if the school officials were in doubt as to who committed the offense, then they must make further inquiry. The original panel decision, quoting from *Whatley*, required that the school officials tell the student what he has done to merit the punishment and at least make "sufficient inquiries" to insure that the student was guilty. *Ingraham v. Wright*, 498 F.2d at 267-268 (App. 176).

None of these procedures are elaborate or formal. They require minimal expenditures of time and effort. Yet they would go far in assuring that the application of physical force to students to discipline or punish them would be carried out fairly, not arbitrarily. No substantial delay would have to occur between the



alleged infraction and the punishment.<sup>22</sup> But taking whatever time is necessary to minimize arbitrariness and capriciousness is a necessary constitutional investment.

The minimal procedures required are:

**1. Notice of the Charges and an Opportunity to be Heard.**

*Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950), makes notice and an opportunity for a hearing essential elements of due process. All that is necessary is that "the student just be told what he is accused of doing and what the basis of the accusation is." *Goss v. Lopez*, 419 U.S. at 582. Essential to the notice requirement is some code of discipline so that a student will not be exposed to punishment for conduct which he did not know was improper.

The hearing must be at least an "informal give and take between student and disciplinarian" prior to the imposition of punishment. *Id.* 419 U.S. at 584. No formal rules of procedures should be imposed, but it is

---

<sup>22</sup>Some attempts have been made to justify the speedy application of the paddle as a means of relieving a student's anxiety. The less time between the offense and the punishment, the less time to worry about the beating. But the Board Policy mandates an analysis of whether the punishment will change a student's behavior and a pre-paddling conference with the school psychologist or physician if the student had been receiving treatment (App. 130, 132). The informal hearing we suggest would not impose a greater delay than that presumably envisioned by the Board Policy.

See also Florida Attorney General's Opinion 074-256, August 29, 1974, which advises that a teacher must consult with the principal before corporal punishment is imposed. An informal hearing could be held at that time.

essential that the school official "pay careful adherence to procedural fairness and reasonableness" because young schoolchildren are limited in their ability "to protect themselves against charges of misconduct." *Sullivan v. Houston Independent School District*, 307 F. Supp. 1328, 1343 (S.D. Tex. 1969).

**2. A Neutral Person Should Decide the Need for Punishment and Impose It If Necessary.**

The importance of having a neutral person to decide the need for punishment and impose it is necessary is twofold. First, it protects a student against harsh treatment inflicted in anger and hostility. The Court has required similar safeguards in other cases. *Taylor v. Hayes*, 418 U.S. 488, 501 (1974). The record in this case reflects the danger of the disciplinarians being judge and jury. Too often they became angry and vindictive, imposing inordinate punishment in their fury (App. 73-75).

Secondly, a neutral person will be more likely to weigh the facts informally presented to him and arrive at an unbiased conclusion. Neutral and detached decision making is an important Fourth Amendment requirement. *Gerstein v. Pugh*, 420 U.S. 103 (1975). It is equally important in civil decision making.

If severe corporal punishment is to be inflicted at all, the Petitioners and their class are entitled to those rudiments of due process.

## III.

**THE AVAILABILITY OF STATE REMEDIES DOES NOT PRECLUDE FEDERAL COURT RELIEF FOR DEPRIVATIONS OF FEDERAL CONSTITUTIONAL RIGHTS BY PERSONS ACTING UNDER COLOR OF STATE LAW.**

The Respondents, citing *Paul v. Davis*, \_\_\_\_ U.S. \_\_\_\_, 47 L.Ed.2d 405 (1976), have argued that the availability of state tort remedies should preclude federal court relief under Title 42 U.S.C. §1983. Brief in Opposition to Petition for Writ of Certiorari, p. 4. Since we anticipate that point being raised in their main brief, we address it now.

The easy doctrinal answer to the Respondents' contention is *Monroe v. Pape*, 365 U.S. 167 (1961):

It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

*Id.* 365 U.S. at 183.

See also *McNeese v. Board of Education*, 373 U.S. 668, 671-672 (1963).

The federal remedy in *Monroe v. Pape* was sought for a deprivation of Fourth Amendment rights. Neither *Paul v. Davis*, \_\_\_\_ U.S. \_\_\_\_, 47 L.Ed.2d 405 (1976), nor *Bishop v. Wood*, \_\_\_\_ U.S. \_\_\_\_, 48 L.Ed.2d \_\_\_\_, 44 L.W. 4820 (1976), erode the principles of *Monroe v. Pape*. In *Paul*, Mr. Davis' claim was based on a loss of liberty (his interest in not being defamed)

absent a hearing. Police officer Bishop's loss of liberty also involved a claimed damage to reputation and a termination of employment based on false reasons. *Bishop v. Wood*, 44 L.W. at 4822. The Court rejected their liberty claims. Since the Constitution contains no specific prohibitions against defamation or the improper loss of employment, no specific constitutional rights were lost. The Court rejected the theory that the procedural guarantees of the Due Process Clause "extend[s] . . . a right to be free of injury wherever the state may be characterized as the tortfeasor." *Paul v. Davis*, 47 L.Ed.2d at 413. Therefore, the Court concluded that the claimants were not asserting denials of any constitutional rights.

But the Constitution does contain explicit guarantees against cruel and unusual punishment and the invasion of one's physical integrity. The Eighth and Fourth Amendments are the sources of the Petitioners' claims. They are seeking redress for acts depriving them of rights "protected and secured by the Constitution . . . of the United States." Cf. *Screws v. United States*, 325 U.S. 91, 108-109 (1945) (plurality opinion); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 390-392 (1971). Therefore, their claims are governed by the doctrine of *Monroe v. Pape*. The state law remedies are irrelevant when specific constitutional guarantees have been violated by persons acting under color of state law.

A final word. We are aware of the admonition of *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), cautioning against federal court intervention in "conflicts which arise in the daily operation of school



systems and which do not directly and sharply implicate basic constitutional values." But cases like this one do not arise daily. The events at Drew Junior High School were unique. The actions of the school officials did sharply conflict with basic constitutional concepts. Reversing the Court of Appeals decision will not offend notions of federalism, nor will it create a wellspring of future federal litigation. A reversal will "provide a formidable bulwark against governmental violation of the constitutional safeguards securing in our free society the legitimate expectations of every person to innate human dignity and sense of worth." *Paul v. Davis*, 47 L.Ed.2d at 433-434 (Brennan, J., dissenting).

### CONCLUSION

For the foregoing reasons, the Petitioners respectfully submit that the decision of the Court of Appeals should be reversed.

The Court should conclude that severe corporal punishment may violate the Eighth Amendment and that on the evidence offered by Ingraham and Andrews, a jury could decide that each of them suffered a deprivation of their constitutional rights. Therefore, Counts One and Two of the Complaint should be remanded to the District Court for trial.

The Court should also find that the imposition of severe corporal punishment must be preceded by informal due process procedures. Since the District Judge dismissed the Eighth and Fourteenth Amendment claims for declaratory and injunctive relief at the close

of the Petitioners' evidence, the District Court, on remand, should be ordered to vacate his Rule 41(b) dismissal of Count Three of the Complaint and consider those claims in light of this Court's reversal of the *en banc* Court of Appeals decision.

Respectfully submitted,

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in the  
**Supreme Court**  
of the  
**United States**

OCTOBER TERM, 1976

No. 75-6527

JAMES INGRAHAM, by his mother and next friend,  
ELOISE INGRAHAM, and ROOSEVELT ANDREWS,  
by his father and next friend, WILLIE EVERETT,  
*Petitioners,*

*vs.*

WILLIE J. WRIGHT, I; LEMMIE DELIFORD;  
SOLOMON BARNES; EDWARD L. WHIGHAM;  
and THE DADE COUNTY SCHOOL BOARD,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit

**BRIEF FOR RESPONDENTS**

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**Supreme Court**  
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OCTOBER TERM, 1976

NO. 75-6527

JAMES INGRAHAM, by his mother and next friend,  
ELOISE INGRAHAM, and ROOSEVELT ANDREWS,  
by his father and next friend, WILLIE EVERETT,  
*Petitioners,*

*vs.*

WILLIE J. WRIGHT, I; LEMMIE DELIFORD;  
SOLOMON BARNES; EDWARD L. WHIGHAM;  
and THE DADE COUNTY SCHOOL BOARD,  
*Respondents.*

On Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENTS



## STATUTES AND REGULATIONS INVOLVED

### Florida Statutes

The Florida statutory law concerning corporal punishment in public schools was significantly changed and expanded, effective July 1, 1976. Petitioners do not challenge the validity of any statute, but they do refer only to the superseded law. For this reason, and because we make reference often in this brief to the old and new laws, we set them forth here.

Florida Statutes sec. 232.27 formerly provided the only statutory reference to corporal punishment (Florida Statutes 1975, Vol. 1, p. 1047).

**232.27 Authority of teacher.**—Each teacher or other member of the staff of any school shall assume such authority for the control of pupils as may be assigned to him by the principal and shall keep good order in the classroom and in other places in which he is assigned to be in charge of pupils, but he shall not inflict corporal punishment before consulting the principal or teacher in charge of the school, and in no case shall such punishment be degrading or unduly severe in its nature. Under no circumstances may a teacher (except of a one-teacher school) suspend a pupil from school or class.

The Florida Legislature in its 1976 session enacted Laws of Florida Ch. 76-236, as yet not integrated into the official Florida Statutes. The full text may be found in West's *Florida Session Law Service*, No. 3, p. 538. It covers a number of subjects related to student conduct and disci-

pline, and amends former sec. 232.27, as well as adding other provisions relating to corporal punishment. The relevant sections of the new law are excerpted below.

### 228.041 *Specific definitions*

Specific definitions shall be as follows and wherever such defined words or terms are used in the Florida School Code they shall be used as follows:

**(28) Corporal punishment.**—Corporal punishment is the moderate use of physical force or physical contact by a teacher or principal as may be necessary to maintain discipline or to enforce school rules.

\* \* \*

### 230.23 *Powers and duties of school board*

The school board, acting as a board, shall exercise all powers and perform all duties listed below:

**(6) Child welfare.**—Provide for the proper accounting for all children of school age, for the attendance and control of pupils at school, for proper attention to health, safety, and other matters relating to the welfare of children in the following fields, as prescribed in chapter 232.

**(c) Control of pupils.**—Adopt rules and regulations for the control, discipline, suspension and expulsion of pupils and decide all cases recommended for expulsion. Suspension hearings are exempted from the provisions of Chapter 120. Expulsion hearings shall be governed by the provisions of s. 120.57(2). Provided,

however, that the school board shall not have the authority to prohibit the use of corporal punishment as provided in this act.

(d) *Code of student conduct*—Make available to all teachers, school personnel, students, and parents or guardians, at the beginning of the 1977-1978 school year and every school year thereafter, a code of student conduct developed in consultation with teachers, school personnel, students, and parents or guardians. The code shall be based on the rules governing student conduct and discipline adopted by the school board and may be made available at the school level in the student handbook or similar publication. The code shall include, but not be limited to: specific grounds for disciplinary action; procedures to be followed for acts requiring discipline, including corporal punishment; and an explanation of the responsibilities and rights of students with regard to attendance, respect for persons and property, knowledge and observation of rules of conduct, the right to learn, free speech and student publications, assembly, privacy, and participation in school programs and activities.

\* \* \*

#### 232.27 *Authority of teacher*

Subject to law and to the rules of the district school board, each teacher or other member of the staff of any school shall have such authority for the control and discipline of students as may be assigned to him by the principal or his designated representative and shall keep good order in the classroom and in other

places in which he is assigned to be in charge of students. If a teacher feels that corporal punishment is necessary, at least the following procedures shall be followed:

(1) The use of corporal punishment shall be approved in principle by the principal before it is used, but approval is not necessary for each specific instance in which it is used.

(2) A teacher or principal may administer corporal punishment only in the presence of another adult who is informed beforehand, and in the student's presence, of the reason for the punishment.

(3) A teacher or principal who has administered punishment shall, upon request, provide the pupil's parent or guardian with a written explanation of the reason for the punishment and the name of the other teacher or principal who was present.

#### 232.275 *Liability of teacher or principal*

Except in the case of excessive force or cruel and unusual punishment a teacher or other member of the instructional staff, a principal or his designated representative, or a bus driver shall not be civilly or criminally liable for any action carried out in conformity with the state board and district school board rules regarding the control, discipline, suspension and expulsion of students.



### School Board Regulations

The Dade County School Board policy on corporal punishment, with its several revisions and an implementing regulation prescribing specific guidelines adopted in 1971, are reproduced in full in the Appendix at 125-132.

### QUESTIONS PRESENTED FOR REVIEW

We accept petitioners' first question as accurate.

Their second question as stated we cannot accept, for reasons we explain at length in argument later (*infra*, pp. 45-47). Substituting "any" for "severe", we restate the question:

DOES THE INFLICTION OF ANY CORPORAL PUNISHMENT UPON PUBLIC SCHOOL STUDENTS, ABSENT NOTICE OF THE CHARGES FOR WHICH PUNISHMENT IS TO BE INFLICTED AND AN OPPORTUNITY TO BE HEARD, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

### STATEMENT OF THE CASE

Petitioners' review of the procedural history of this case, through the original opinion by a panel of the Court of Appeals and its supersession by the *en banc* decision now under review, is adequate.

The statement of facts, however, designed by petitioners to show an "ambience of oppression" and consisting only of selected excerpts of student testimony concerning paddlings at one junior high school, is hardly complete or fair. We give the additional statement below in order to offer a better perspective for the argument which follows.

The Dade County public school system is the sixth largest in the nation, having in 1972, when this case was tried, 237 schools with an elementary-secondary student population of over 240,000, and employing some 12,000 instructional personnel (App. 43-44). Its annual budget in 1972 (App. 45) was close to \$300,000,000 (the figures shown in the record as thousands rather than millions are simple transcription errors).

The Superintendent of the school system, an experienced educator, discussed the various methods available for maintaining order and good behavior in the schools, beginning with adequate instructional programs to suit student needs and ranging through student civic participation, personal conferences with students and parents, the utilization of specialized staff such as visiting teachers and psychologists, curriculum adjustments, corporal punishment, and suspension from school for limited periods (App. 47-49). Acknowledging differences of opinion among educators about the use of corporal punishment, he described it as seen to be a useful technique under certain circumstances and as having the purpose of keeping the punished student in school, in contrast to suspension or expulsion which terminate the student's education temporarily or permanently (App. 50-51).

At the time the case was tried, Florida law authorized corporal punishment in defining the authority of the teacher to keep order, but provided that the punishment could be used only after consulting with the principal. Florida Statutes sec. 232.27 (quoted in full *supra* at p. 2). The Dade County School Board's policy authorizing corporal punishment "as a means of changing the behavior of the student" reiterated this requirement, placing the responsibility on the principal to determine the need and fix the time, place and person to administer punishment. The policy provided that the student should understand the seriousness of the offense and the reason for the punishment, that the time between offense and punishment should not be so long as to cause undue anxiety to the student, and that punishment was to be administered in kindness and in the presence of another adult, under conditions not calculated to hold the student up to ridicule or shame. (The policy, as effective in 1970 and as revised twice, is reproduced at App. 125-130. An implementing regulation to the last revision, specifying guidelines for school personnel, is at App. 131-132.)

The Superintendent in his testimony affirmed his view that the principal, as the person passing judgment on all the practices in his school, was the proper decision-maker for the use of corporal discipline (App. 53). He saw it as desirable that the punishment, if used, follow the offense quickly, to avoid building undue concern in the mind of the student (App. 51-52). He considered the posting of a detailed list of infractions, as causes for corporal punishment, as undesirable because tending to remove any judgmental aspects from disciplinary choices (App. 52).

Statistics embodied in a stipulation showed variations in the employment of corporal punishment in the school system, depending upon local school policy (App. 141-145). Sixteen schools did not administer corporal punishment at all. The principal of Miami Beach Senior High School cast light upon this, testifying that he found it philosophically unacceptable, but also unnecessary in his school, which serves a predominantly Jewish population with a culture of oral persuasion and strong family response. The principal also said, though reluctantly, that he would choose corporal punishment as preferable to expulsion, if it were corrective to the student (R. 778-781, 787).

Less creditably, the statistics and the testimony at trial reflected failures of adherence to the School Board policy, in that some teachers did not first confer with the principal, more than the authorized number of strokes were sometimes given, and an adult witness was not invariably present. The District Judge noted this in his order of dismissal, while observing that:

"With the exception of a few cases, the punishments administered have been unremarkable in physical severity. The instances of punishment which could be characterized as severe, accepting the students' testimony as credible, took place in one junior high school."

(App. 152)

That school was Drew Junior High, from which almost all of the student witnesses at the trial were drawn. Aside from the preponderance of students from this one school, it will be noted that only the plaintiffs' witnesses testified at the trial. The accused individual principal and his assist-



ants had no opportunity to give evidence, and aside from several school personnel called as adverse witnesses for limited purposes, the testimony came only from selected students and some of their relatives.

This testimony, focusing on one school out of 237, did show (again assuming the students' credibility) some *instances* of severe paddling by one or more of the three individual defendants. However, we reject petitioners' colorful conclusion that the evidence showed despotism, or an "atmosphere of oppression" at Drew Junior High. If the record is read without creative effort, it does not display any preconceived pattern or practice of severity at the school, or as to all students in the school, but only shows that a relatively few students received severe paddlings.

Almost without exception, the students who were punished, including the ones punished severely, (1) knew why they were punished; (2) progressed normally in school, both before and after attending Drew; and (3) were sometimes embarrassed but not otherwise shown to be affected in their reputations or their prospects for further schooling or employment (the many references to the record to support these conclusions may be found in our later argument in this brief, at pp. 52, 56, and 60).

## SUMMARY OF ARGUMENT

### I

THE EIGHTH AMENDMENT HAS BEEN  
AND IS NOW LIMITED TO PUNISHMENTS  
ANNEXED TO CRIMES, AND SHOULD NOT  
BE EXTENDED TO CORPORAL DISCIPLINE  
IN PUBLIC SCHOOLS

While occasional instances of abuse may occur, the Eighth Amendment does not provide, and should not be distorted to find, a federal cause of action for every incident of corporal discipline in public schools which may be perceived as excessive by a parent or student.

The Eighth Amendment affords a remedy only if a hardship suffered is "punishment" within the constitutional intendment of the term. Historically, the Amendment descends directly from the "English Bill of Rights of 1689" by which Parliament acted to forbid the incredible cruelties which were being inflicted by English courts as punishments for crimes.

Not only origin and intent, but consistent interpretation by this Court, limits the scope of the cruel and unusual punishment clause to penalties imposed in connection with the process of criminal adjudication. The Court has always, as a threshold test, found a criminal process nexus between the punishment and the act which gave rise to it. Corporal discipline in public schools is entirely unrelated to the criminal process, and the one decision by a court of appeals which holds the Eighth Amendment applicable to school discipline is devoid of analysis or other reasoned support.

While this Court has extended the application of the clause since its adoption, the expansion has always been in the interpretation of the terms "cruel and unusual," never in the basic class to which the Eighth Amendment applies—those punished pursuant to the criminal process. The decision in *Trop v. Dulles*, 356 U.S. 86 (1958), from which petitioners argue that any "penal" act invokes the Eighth Amendment, actually illustrates most clearly the true limits of the Amendment. The penalty, loss of citizen-

ship, was held cruel and unusual only after it was seen by the Court as having been inflicted collateral to a criminal conviction. In its companion case, *Perez v. Brownell*, 356 U.S. 44 (1958), the Court permitted exactly the same penalty, loss of citizenship, when imposed for the performance of a civilly precluded act.

Other precedent and policy considerations also forbid the radical extension of the Eighth Amendment to discipline in public schools. State legislation and common law clearly sanction corporal discipline as an approved measure for maintaining an orderly climate for learning, and for correcting misbehavior. Even severe cases are not cognizable as "federal torts" under 42 U.S.C. sec. 1983, which is not a broad-gauge vehicle providing a federal remedy for every case of official harm. On the other hand, perfectly adequate state remedies exist. The application, by some lower courts, of the Eighth Amendment to protect confined prisoners is consistent with the true limits of the Amendment, and in any case is not analogous to discipline in public schools. The purpose of educational corporal discipline is corrective, not penal or retributive, and schools, unlike prisons, are open and subject to parental oversight and public scrutiny.

Corporal discipline is a traditional means of keeping order in schools. Even the occasional non-traditional instances of severe punishment cannot properly be viewed as "constitutionally suspect," as petitioners contend, or else the Eighth Amendment is open to provide a test in federal court of every alleged "severe" or "disproportionate" educational decision imposing a hardship upon a child in school—and beyond that, the Amendment would

also be open as a wellspring of new tort litigation over incidents of other official immoderation in discharging civil functions.

Finally, by any view the punishments reflected by the record below do not rise to the proportions of Eighth Amendment violations, as the District Judge who tried this case specifically found.

## II

ROUTINE CORPORAL DISCIPLINE IN PUBLIC SCHOOLS TAKES NO PROPERTY AND HAS TRIVIAL EFFECT ON A STUDENT'S LIBERTY. EVEN MINIMAL DUE PROCESS PROCEDURES ARE UNNECESSARY AND UNDESIRABLE.

The question posed by petitioners in their argument for due process procedures is paradoxical and inappropriate, and must be revised. Obviously, no amount of prior due process could legitimize an excessive punishment, and no workable or sensible formula can be drawn which would pertain only to "severe" corporal punishment. The true issue is whether the Fourteenth Amendment mandates due process procedural steps before *any* administration of corporal punishment to public school students.

This Court's decision in *Goss v. Lopez*, 419 U.S. 565 (1975), honoring while distinguishing prior warnings by the Court against judicial interposition in the public school systems, takes the federal judiciary as far as it should go into the oversight of educational decision-making. The line should and can be clearly drawn between suspensions from school, afforded minimal due process by *Goss*, and corporal discipline.



This Court in *Baker v. Owen*, 423 U.S. 907 (1975), affirmed the authority of school administrators to use corporal punishment even over parental objections. The Court should not be induced to frustrate that authority by unsound comparisons between suspensions and corporal discipline. The Court in *Goss* found suspension to be deprivation of a substantial property interest in education conferred by state law, with consequential effects upon the student's employment prospects and reputation. By contrast, the very purpose of corporal discipline is to avoid exclusion of the student from the educational process. Thus no property interest is involved in routine cases of punishment, and the record below shows no evidence of educational retardation, much less deprivation, to the punished Dade County students.

Nor does corporal discipline implicate any realistic "liberty" interest. No state or federal law guarantees a student the right to attend public school free of physical discomfort as punishment for misconduct. Petitioners' resort to the Fourth Amendment as a guarantee of privacy is totally without precedent and was never argued below. Routine punishment is furthermore a trivial interference, not a deprivation, insofar as the student's liberty is concerned, and cannot be equated with a suspension as a "serious event in the life" of a child. No reputational injury ensues, as the record below shows. Neither future education nor employment prospects are jeopardized by school records of spankings, which in any event are protected from publicity by both Florida and federal law.

Balancing the interests of students in avoiding mistaken corporal punishment against the needs of educators for effective and efficient disciplinary alternatives, Amer-

ican history and American law clearly approve of corporal discipline and trust educators to administer it, while providing remedies against child abuse. The Court should not destroy that balance by imposing constitutional mechanics, and making federal court the forum for review of a new multitude of day-to-day educational decisions.

Even the "minimal" procedures suggested by petitioners are unnecessary, undesirable, and unworkable. Any attempt to prepare a catalogue of specific misbehavior warranting corporal punishment would either be too general to be informative to young children, or ineffective to encompass every possibility of juvenile mischief, and would remove judgmental discretion from educators in dealing with behavior problems.

Notice and an opportunity to be heard are by any common sense view already inherent in common experience of teacher-pupil relationships. Only in the rarest case will a student not know why he is punished or have a chance to explain, and the record in this case demonstrates that the students who testified did indeed know why they were punished and many did deny misconduct.

Florida law in its current form provides the elements of notice, and requires written procedures for administering corporal punishment, and the Dade County School Board has for years regulated the practice. It does not follow that additional constitutional procedures are necessary, if the principle of local control of education retains any vitality. A new federal mandate of procedural steps prior to any instance of corporal discipline can only be seen by educators as a frightening invitation to more federal litigation, with possible personal liability, over claims

of procedural flaws in decisions to utilize this form of discipline. The expected results would be over-formalization of procedures, for the protection of conscientious administrators, or the discarding of corporal discipline as a viable measure, with a resort to suspension and expulsion for misbehavior now seen as correctible by punishment. Neither alternative is sensible as a goal.

Petitioners' suggestion that a neutral arbiter is necessary for each decision to use corporal discipline is a novel conception, and would surely guarantee a formal process, with delay and anxiety for the student, an adversary and unseemly atmosphere of adjudication, and untold administrative complications and diversion of school resources.

Due process procedures have their true and vital functions, but they have no proper place in this traditional and routine area of school administration.

## ARGUMENT

### I

THE ORIGIN, INTENT AND UNBROKEN INTERPRETATION OF THE EIGHTH AMENDMENT LIMIT ITS APPLICATION TO CRIMINAL PUNISHMENTS. IT SHOULD NOT BE EXTENDED TO PROVIDE A SOURCE OF FEDERAL TORT ACTIONS ARISING FROM CORPORAL DISCIPLINE IN PUBLIC SCHOOLS.

Whether or not the Eighth Amendment to the United States Constitution applies to the use of corporal punish-

ment as a disciplinary measure in public schools is now before this Court for the first time. The Fifth Circuit, in the *en banc* decision now under review, holds the Eighth Amendment inapplicable, with the only genuine analysis given by any court which has considered the question.

The implications of a contrary interpretation, extending the reach of the Eighth Amendment to permit a federal cause of action in the case of every school paddling perceived by a student or parent to have been excessive, are enormous. The petitioners' argument for extension, however, largely begs the key question of constitutional interpretation, while spending much emotion in attempting to persuade the Court that because instances of abusive corporal discipline may and do occur, a constitutional remedy must necessarily exist (or be created). Petitioners do their best to present this as a hard case, and since the record below consists only of the plaintiffs' evidence in the trial court, it lends itself to indignant treatment with respect to the testimony of some of the student witnesses. Nevertheless, hard cases still tend to make bad law, and even worse constitutional law—and indignation, we suggest, is hardly a reliable source of guidance in testing the limits of constitutional provisions.

The limits of the Eighth Amendment's prohibition against cruel and unusual punishment can be tested by history, precedent, and policy. None of these approaches permit the wholesale importation of school discipline cases within the constitutional text.



A. THE IMPOSITION OF CORPORAL EDUCATIONAL DISCIPLINE IN PUBLIC SCHOOLS IS NOT "PUNISHMENT" WITHIN THE SCOPE OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE.

For a constitutional remedy to be found under the cruel and unusual punishment clause, it is first necessary that the hardship suffered be "punishment" within the constitutional intendment of the term. It is semantically easy for petitioners to equate paddling with punishment, but this literal equation is false, for the term "punishment" as understood and interpreted in legal history and in the decisions of this Court has uniformly meant the penalty imposed either concurrent with or as a result of a criminal prosecution. This interpretation of the term has been consistent from the beginning.

1. **Historically the Cruel and Unusual Punishment Clause Was Directed at Criminal Penalties.**

Legal historians generally agree that the cruel and unusual punishment clause had its origin in the "English Bill of Rights of 1689." See J. Story, *On The Constitution Of The United States* §1903 at 680 (3rd Ed. 1858), cited in *Furman v. Georgia*, 408 U.S. 238, 317 (J. Marshall, concurring). See also Rutland, *The Birth Of The Bill Of Rights*, 1776-1791 at 9 (1955). The incidents of torture and barbarism inflicted under the reigns of some of the Stuarts drove Parliament to limit the power of government in its imposition of punishments. J. Story, *supra* at

681. A review of the incredible cruelties inflicted during that period indicates the punishments which inspired Parliament to act.<sup>1</sup>

The critical historical fact is that the governmental limitations imposed by this clause on the infliction of punishment were exclusively directed toward the process of criminal prosecutions. 4 W. Blackstone, *Commentaries* \*376-77.

An identical understanding of the clause is evidenced in American legislative history. In his edition of Blackstone's *Commentaries*, St. George Tucker noted those aspects of the *Commentaries* which had an impact on the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia. Of particular significance here are his notations concerning the infliction of cruel and unusual punishments.

In Chapter 29, "Of Judgment and It's (sic) Consequences", Blackstone enumerated the multifarious criminal penalties prescribed by the law and meted out by the courts. 4 W. Blackstone, *Commentaries*. Tucker's footnotes to this section exhibit a clear indication that the enumeration was critical to the consideration surrounding the adoption of the Virginia Declaration of Rights. 4 W. Black-

<sup>1</sup>4 W. Blackstone, *Commentaries* \*376-78.

Included among the available penalties were: being drawn and dragged to the place of execution; embowelling alive; beheading; quartering; burning alive; mutilation by removal of a hand or an ear; lasting stigma by slitting nostrils, or branding on the hand or cheek.

Blackstone further commented that those were considered the more humane punishments when contrasted with the penalties imposed in Civil Law Countries.

stone, *Commentaries* \*376 (Tucker Ed. 1803, Notes 4-7). Following the debates, the English version was adopted verbatim.

Subsequently, the issue again arose during the debates of the Convention of Virginia meeting for the purpose of Federal Constitutional Ratification. Patrick Henry addressing the assembly on the necessity for a Federal Bill of Rights stated:

"Congress, from their general powers, may fully go into business of human legislation. They may legislate, in *criminal* cases, from treason to the lowest offence—petty larceny. They may *define crimes and prescribe punishments*. In the definition of *crimes*, I trust they will be directed by what wise representatives ought to be governed by. But, when we come to *punishments*, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our bill of rights?—'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more—you depart from the genius of your country. That paper tells you that the trial of crimes shall be by jury, and held in the state where the crime shall have been committed. . . . In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding ex-

cessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone."

3 *Elliot's Debates* 447 (emphasis added).

Clearly, this passage indicates the common understanding of the clause within the assembly.

History also indicates, contrary to petitioners' assertions, that at the time of the conventions for ratification of the Constitution and the Bill of Rights, systems of public education were in operation, and were familiar to the framers of our federal charter.

Colonial legislatures used the town as a civil subdivision of the state to govern and operate local political and school affairs. In Massachusetts in 1789, the legislature enacted laws establishing the power to create independent public school districts. Edwards and Richey, *The School In*



*The American Social Order* 110-112 (1947); Knezevich, *Administration Of Public Education* 113-114 (2d Ed. 1969).

Federal educational activity, as well, commenced prior to the adoption of the Constitution and Bill of Rights. The Continental Congress enacted the Ordinance of 1785 which contained public educational provisions. It stated, "there shall be reserved the lot number 16 in each township for the maintenance of public schools in said township . . ." Two years thereafter in the Ordinance of 1787, commonly known as the Northwest Ordinance, the Congress reiterated its support for public education, stating, "schools and the means of education shall forever be encouraged."

We do not argue here that school punishments were consciously *excluded* by the framers of the Eighth Amendment—no doubt the question never crossed their minds. Our point is, in this historical inquiry, that neither public schools nor corporal discipline in schools were unknown to the fathers of the Constitution, and there is nothing to suggest that they contemplated its inclusion within the reach of the Amendment.

**2. Controlling Judicial Interpretation Has Consistently Limited the Scope of the Clause to Punishments Inflicted Concurrent with, as a Result of or Subsequent to the Criminal Process.**

The decisional law which has developed subsequent to the adoption of the cruel and unusual punishment clause by both state and federal governments, has reiterated the understanding that the clause applies only to the criminal process.

This Court has consistently held that the cruel and unusual punishment clause does not apply to non-criminal penalties. In *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893), the Court considered and rejected a petition for habeas corpus based on the cruel and unusual punishment clause. The petitioner had been ordered deported as the result of a non-criminal procedure. Justice Gray for the Court, stated:

"The order of deportation is not punishment for *crime* . . . Therefore the provisions of the constitution . . . prohibiting . . . cruel and unusual punishments, have no application."

Civil contempt proceedings have also been challenged on cruel and unusual punishment grounds before this Court. In *Uphaus v. Wyman*, 360 U.S. 72 (1959), a corporate official refused to comply with a subpoena duces tecum calling for production of names contained on a list in his possession. The petitioner was found in civil contempt and ordered confined until he complied. One issue raised on appeal was whether this confinement constituted cruel and unusual punishment. The Court concluded that continued disobedience to a valid civil order resulting in confinement gave rise to no constitutional objection.

This same construction of the cruel and unusual punishment clause has been rendered by both federal and state courts. *Mahler v. Eby*, 264 U.S. 32 (1924); *Bugajewitz v. Adams*, 228 U.S. 585 (1913); *In re Chin Wan*, 182 F. 256 (D. Ore. 1910), *aff'd sub nom.* 187 F. 592 (9th Cir. 1911); *Soewapadji v. Wixon*, 157 F.2d 289 (9th Cir. 1946) *cert. denied*, 329 U.S. 792; *Germany v. Hudspeth*, 209 F.2d

15 (10th Cir. 1954). State Courts: *Ex parte Naccarat*, 328 Mo. 722, 41 S.W.2d 176 (1931); *People v. Chapman*, 301 Mich. 584, 4 N.W. 2d 18 (1942).

The converse of the principle of civil exclusion is criminal inclusion. In all cases in which this Court has confronted the cruel and unusual punishment clause, there has been a criminal nexus upon which to proceed to full consideration. *Gregg v. Georgia*, \_\_\_\_\_ U.S. \_\_\_\_\_, 96 S.Ct. 2909 (1976) (Death penalty imposed for armed robbery and murder); *Furman v. Georgia*, 408 U.S. 238 (1972) (Death penalty imposed for the commission of a murder); *Robinson v. California*, 370 U.S. 660 (1962) (Crime to be addicted to narcotics); *Trop v. Dulles*, 356 U.S. 86 (1958) (Penalty imposed as a direct result of a criminal conviction for desertion); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (Death penalty reimposed after failure of execution equipment used in previous execution attempt); *Weems v. United States*, 217 U.S. 349 (1910) (Punishment inflicted for commission of a crime not proportional to the nature of the crime committed); *In re Kemmler*, 136 U.S. 436 (1890) (Electrocution as a punishment for commission of crime not cruel and unusual); *Wilkerson v. Utah*, 99 U.S. 130 (1879) (the use of firing squad to carry out punishment for crime not cruel and unusual).

This requirement of criminal process as a prerequisite was addressed by this Court in *Powell v. Texas*, 329 U.S. 514, 531 (1968). In discussing the applicability of the cruel and unusual punishment clause, Justice Marshall stated:

"The primary purpose of that clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes . . . (emphasis added).

As support for this proposition, Justice Marshall cited *Trop*, *State of Louisiana ex rel. Francis*, and *Weems*.

The threshold test is thus; whether there is a criminal process nexus or link between the punishment inflicted and the act which gave rise to its imposition.

Neither the Florida statutes which authorize the imposition of corporal educational discipline nor any pleading in this case suggests that this mode of discipline or the reasons therefor are in any way a part of the criminal process. No other statute has been found in which this form of discipline has been considered criminal. Only in the State of Texas is the nature of the act as a basis for criminal prosecution of the administrator even considered, and in that case as a specific *exclusion* from the criminal code. Tex. Penal Code §9.62 (1973).

The Fifth Circuit below affirmed this principle of the civil-criminal distinction. Other support for this conclusion can be found in *Sims v. Waln*, 388 F.Supp. 543 (S.D. Ohio 1974), *aff'd* \_\_\_\_\_ F.2d \_\_\_\_\_ (No. 75-1383, 6th Cir., decided June 15, 1976); *Gonyaw v. Gray*, 361 F.Supp. 366 (D. Vt. 1973); *Negrich v. Hohn*, 246 F.Supp. 173 (W.D. Pa. 1965), *aff'd* 379 F.2d 213 (3rd Cir. 1967).

As the court below pointed out, only one case, *Bramlet v. Wilson*, 495 F.2d 714 (8th Cir. 1974), has held corporal



discipline in public schools to be subject to the Eighth Amendment, although a few district court decisions have assumed the result without really examining the problem. See *Ingraham v. Wright*, 525 F.2d 909, 913 (5th Cir. 1976) (footnote 3). An examination of those cases, and particularly of *Bramlet v. Wilson*, *supra*, quickly discloses that the treatment of the Eighth Amendment question has been superficial, at best. In *Bramlet*, for example the Eighth Circuit was dealing only with the face of a complaint dismissed below; the opinion was delivered by only two circuit judges, with the Chief Judge dissenting; and the opinion makes no analysis whatever of the history, intent or interpretation of the Eighth Amendment. In contrast, the decision of the Fifth Circuit now under review was rendered upon a full-blown record of proceedings including a week-long trial; it was decided *en banc*, with all but three judges concurring on the inapplicability of the Eighth Amendment; and it carefully traced the intent and meaning of the cruel and unusual punishment clause.

### 3. The Expansion of the Application of the Eighth Amendment Has Been Limited to Punishments Annexed to the Criminal Process.

There can be no doubt that this Court has extended the application of the cruel and unusual punishment clause since its adoption. However, the expansion that has occurred has, in each instance, been in the interpretation and meaning of the terms "cruel and unusual." The class protected by the Amendment, those punished pursuant to the criminal process, has never been expanded (nor has it been limited within that class).

In *Weems v. United States*, 217 U.S. 349 (1910), the Court reexamined and expanded the definition of "cruel and unusual" by comparing the nature of the crime with the severity of the punishment inflicted. The Court reasoned that while certain punishments may not be inherently cruel, their severity could be measured as cruel and unusual if the particular punishment does not fit the crime committed, within reasonable limitations.

The next extension occurred in *Trop v. Dulles*, 356 U.S. 86 (1958) where penalties imposed collateral to a criminal prosecution were found to give rise to Eighth Amendment treatment if such punishments were "penal" in nature. Since petitioners rely heavily on this decision, it is important to analyze just what the Court did and did not decide there.

*Trop* was decided in conjunction with *Perez v. Brownell*, 356 U.S. 44 (1958). Both cases involved the loss of citizenship for acts defined in The Nationality Act of 1940 as amended. 8 U.S.C. §1481. *Perez* lost his citizenship by voting in a foreign election. *Trop* lost his citizenship by reason of his conviction and dishonorable discharge for wartime desertion.

In the *Perez* decision, the Court found that citizenship could be statutorily removed as a result of the citizen performing a proscribed act. Thus, the loss of citizenship could properly be imposed for the performance of a civilly precluded act.

In *Trop*, Chief Justice Warren distinguished *Perez* by first finding the criminal process nexus which was absent in *Perez*. From this nexus the Chief Justice then,

and only then, proceeded to examine denationalization from an Eighth Amendment perspective. Several excerpts from the opinion clearly show this analysis:

"The statute in *Perez* decreed loss of citizenship—so the majority concluded—to eliminate those international problems that were thought to arise by reason of a citizen's having voted in a foreign election. The statute in this case, however, is entirely different. Section 401(g) decrees loss of citizenship for those found guilty of the crime of desertion."

(356 U.S. at 93)

"Section 401 (g) is a penal law, and we must face the question whether the Constitution permits the Congress to take away citizenship as a punishment for crime."

(356 U.S. at 99)

"The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice."

(356 U.S. at 99-100)

. . .

"Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect."

(356 U.S. at 99-100)

"The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."

(356 U.S. at 102)

The penalty imposed by the act was collateral to the punishment of confinement served by *Trop*. The Chief Justice therefore applied a secondary internal test to determine whether denationalization was "penal" or "non-penal." The analysis of the penal-non-penal distinction was not undertaken for the purpose of determining *whether* the Eighth Amendment consideration attaches, but rather for an additional internal determination that the collateral penalty imposed pursuant to a criminal prosecution was in and of itself penal in nature.

Thus the Chief Justice in *Trop* developed a secondary test to be applied when a penalty is collaterally attached to a criminal prosecution. The analysis used in the decision had three stages:

1. Whether there was a criminal process nexus to give rise to an Eighth Amendment consideration?
2. Whether the collateral punishment imposed was "penal" or "non-penal"?
3. Whether, if "penal," the punishment constituted cruel and unusual punishment?

The teaching of the decision in *Trop*, when compared to its companion case, *Perez*, is twofold: (1) There was an illumination of the process necessary to give rise to the cruel and unusual punishment consideration; and (2)



There was an expansion of those punishments which were considered cruel and unusual in light of the expanding concepts of human dignity.

The most recent expansion of the cruel and unusual punishment clause arose in *Robinson v. California*, 370 U.S. 660 (1962). California had enacted a statute making it a crime to "be addicted to the use of narcotics." The Court held that "a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts cruel and unusual punishment." 370 U.S. 660 at 667.

The thrust of this interpretation of the cruel and unusual punishment clause was expressed by Justice Marshall in *Powell v. Texas*, 392 U.S. 514, 533 (1968). "Criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*."

In sum, then, the decisional interpretation of the cruel and unusual punishment clause by this Court simply does not support petitioners' attempt to implant corporal discipline in public schools within the Eighth Amendment. The Court has clearly been willing, as in *Trop v. Dulles*, *supra*, to examine penalties in the light of "the evolving standards of decency that mark the progress of a maturing society." 356 U.S. at 101. Just as clearly, the Court has never held or even intimated that the Eighth Amendment has no bounds, and may be uncritically applied to corrections or punishments having nothing whatever to do with the process of criminal adjudication.

B. EXTENSION OF THE EIGHTH AMENDMENT TO SCHOOL PUNISHMENT IS INCONSISTENT WITH CONTROLLING AUTHORITY UNDER 42 U.S.C. SEC. 1983, UNNECESSARY IN VIEW OF STATE POLICY AND REMEDIES, AND UNWISE AS PRECEDENT.

We have sought to demonstrate that neither history, original intent, nor precedent place school discipline within the ambit of the Eighth Amendment. We turn now to the question whether the Amendment *should* be extended in the radical manner proposed by petitioners.

It is interesting to observe the ambivalence in petitioners' line of argument with respect to the constitutional status of corporal punishment in the schools. They concede, as they must, that "it may be premature to conclude that *all* corporal punishment violates . . ." (the Eighth Amendment). (Pet. Brief p. 35). They cannot resist, however, lapsing into suggestions that there is, or is developing, a general disapproval of corporal discipline, and that perhaps a total ban of the practice would be in order. This is *not* the issue in this case, nor do we believe that the matter is open to serious discussion. A brief digression, however, may help to place the policy considerations in perspective.

The decisions are in complete agreement that corporal punishment is not invalid *per se*, on any constitutional ground. Moderate physical punishment as a means of correcting misbehavior and enforcing discipline in the schools is sanctioned by historical principles of tort law, *see* 1 W. Blackstone, *Commentaries* \*453; and by current prevailing legal standards. *See* Prosser, *The Law of Torts*, sec. 27, Defenses to Intentional Interferences with Persons or Property; *Restatement (Second) of Torts*, secs. 147(2)

and 153(2). The best indication of contemporary approval of corporal punishment in the public schools can be found in the widespread express legislative authority for the practice. Thirty-three states recognize and authorize corporal discipline by statute, either directly or by legislative adoption of the common law doctrine of *in loco parentis*. While two states prohibit the measure and there is considerable variation in local practice, the clear weight of state policy sanctions corporal discipline in the schools.<sup>2</sup> Florida's statutory history shows a legislative direction toward encouragement of this disciplinary measure, perhaps as a result of the studies and press reports of disorder and disruption in the schools which are all too common these days in this country.<sup>3</sup>

The true question which must be faced is whether instances of *severe* corporal punishment invoke such compelling considerations of principle as to require an entirely new and further extension of the Eighth Amendment. Petitioners appear to tackle this problem by the use of three very dubious rhetorical devices—the syllogism, the paradox, and the selection of language by this Court, out of context, as a postulate for argument.

The syllogism used by petitioners is a deceptively simple one. Excessive punishment by state officials under

<sup>2</sup>The statutory references are collected in petitioners' brief at footnotes 8, 9 and 10.

<sup>3</sup>Compare the earlier version of Florida Statutes sec. 232.27, which by negative implication authorized corporal punishment, with the extensive statutory enactments of the Florida Legislature in 1976 which define corporal punishment, delineate the procedures for its use, exempt principals and teachers from liability for employing it within authorized guidelines, and forbid Florida school boards from prohibiting the use of corporal punishment. The old and new statutory provisions are set forth in this brief at p. 2.

color of law is "cruel and unusual"—school administrators who punish excessively are acting for the state under color of law—therefore the Eighth Amendment must be violated. The first defect in this, of course, is the assumption that a severe corporal chastisement, although perceived to be both cruel and out of the ordinary in the literal understanding, must necessarily be viewed, constitutionally, as "cruel and unusual punishment." We have dealt with this in the preceding section of this brief. Beyond this, however, it is clear that gross or brutal misconduct by state officials is not perforce a deprivation of a *federal* right. As Justice Douglas observed in the (plurality) opinion which became the judgment of the Court in *Screws v. United States*, 325 U.S. 91, 108-109 (1945):

"Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured or even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States."

In *Screws* the Court was considering a conviction under sec. 20 of the Criminal Code, 18 U.S.C. sec. 52, presently to be found at 18 U.S.C. sec. 242. This was and is the criminal counterpart to 42 U.S.C. sec. 1983, under which the present action was brought. Screws, a Georgia sheriff, had beaten to death a prisoner in the course of an arrest for theft of a tire. The Court, obviously revolted by the brutality, upheld the constitutionality of the criminal statute by construing it to require proof of intent to deprive the victim of a *constitutional right* (the right to trial), not merely of intent to harm or kill him, and then reversed for



a new trial upon proper jury instructions with respect to Screws' intent. We recognize the element of willfulness required to satisfy the criminal statute, and that specific intent need not be proved as an element in a civil action under 42 U.S.C. sec. 1983. *Monroe v. Pape*, 365 U.S. 167 (1961). The point here, however, is that harm, even gross injury, by a state official acting under cloak of state authority does not automatically give rise to a federal cause of action. The record in this case, for example, at worst interpretation reflects no more than proof of assault and battery, which is not *per se* a federal case under 42 U.S.C. sec. 1983. See *Negrich v. Hohn*, 246 F.Supp. 173, 178 (W. D. Pa. 1965), *aff'd* 379 F.2d 213 (3rd Cir. 1965). This Court has just this year strongly rejected the view that the Fourteenth Amendment and sec. 1983 make actionable "many wrongs inflicted by government employees which had heretofore been thought to give rise only to state law tort claims." *Paul v. Davis*, \_\_\_\_\_ U.S. \_\_\_\_\_, 96 S.Ct. 1155, 1159 (1976). The *en banc* decision of the Court of Appeals in this case made exactly the same point in these words (525 F.2d 909 at 915):

"We do not mean to imply by our holding that we condone child abuse either in the home or the schools. We abhor any exercise of discipline which could result in serious or permanent injury to the child. Indeed, if the force used by defendant teachers in disciplining plaintiff was as severe as plaintiffs allege, a Florida state court could find defendants civilly and criminally liable for tortious conduct exceeding the level of severity authorized by 232.27 Fla. Stat. Ann. and by Dade County School Board policy 5144. The basis of such actions is, however, tort and criminal law,

*not* federal constitutional law. We find it neither proper nor necessary to expand the Eighth Amendment beyond its intended and reasonable scope to encompass an action which is essentially based on the commission of a battery."

The clear lesson of the decisions interpreting 42 U.S.C. sec. 1983 is that not all official abuse or harm is remediable in the federal courts. The wrong complained of, if based on constitutional claims, must be distinctly seen as a violation of some discrete provision in the Constitution to which the plaintiff may look for protection. The Eighth Amendment simply should not be distorted to encompass the tort claims of paddled students. On this point, let us say in passing that we agree with petitioners that the availability of a state remedy does not in and of itself preclude federal relief in appropriate cases falling within the scope of sec. 1983. On the other hand, it is surely not irrelevant that full and adequate state remedies, both civil and criminal, are available to students who may be punished excessively. The civil rights legislation enacted after the Civil War, of which sec. 1983 is a descendant, was born for the purpose of vindicating the newly-won rights of the blacks, which were *not* being enforced in many states. See *Monroe v. Pape*, 365 U.S. 167, 172-183, for an exhaustive discussion of the origin and purpose of the "Ku Klux Act." There is no suggestion in this record, nor any argument by petitioners, that any state in the nation is any less vigilant in its concern for the protection of children than is the federal judiciary. The Florida statutes, for example, prescribe criminal penalties for child abuse. Florida Statutes, secs 827.03(3) and 827.07.

The paradoxical argument which petitioners offer to the Court refers to the decision below as refusing constitutional redress to school children, while "hardened criminals" may resort to the Eighth Amendment. Petitioners see this as an intolerable "anomaly." There are several answers. In the first place, the so-called anomaly is false, because the comparison is false. Perez lost his citizenship, while Trop regained his citizenship, by two decisions rendered by this Court on the same day, and perhaps Perez thought this somewhat anomalistic.<sup>4</sup> Yet he was without, and Trop was within, the true boundaries of the Eighth Amendment, and so the paradox disappears, as it does in the present case.

Secondly, it is not true to say, as petitioners suggest in their brief (p. 28), that corporal punishment administered to a student for an offense which also was a crime amounts to punishment "which would have been unconstitutional had he been convicted of the crime". Corporal punishment as a sentence for criminal infractions is indeed unusual nowadays, and prohibited in some states. E.g., N.D. Cent. Code sec. 1-47-26 (1960); S.D. Code sec. 13.4715 (1939). However, this is by state legislative policy and choice—no case has been found forbidding a state from choosing to employ corporal punishment, as the prescribed punishment for crime, on federal constitutional grounds. Sections of the Delaware Code (now repealed) which authorized lashes as a form of punishment were held constitutional in *State v. Cannon*, 190 A.2d 514 (Del. 1963), the Delaware Supreme Court observing that the Supreme Court of the United States had never ruled on the issue.

<sup>4</sup>Compare *Perez v. Brownell*, 356 U.S. 44 (1958) with *Trop v. Dulles*, 356 U.S. 86 (1958). The decisions are discussed earlier in this brief at p. 27.

So again the paradox dissolves, and as we have shown earlier, state policy with respect to school discipline, as expressed in statutes and the common law, is overwhelmingly approbative.

Finally, petitioners' paradox relies heavily on reference to *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), in which the flogging of prisoners in Arkansas penitentiaries was held to violate the Eighth Amendment, and to *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), holding that disciplinary beatings as inflicted in an Indiana juvenile reformatory warranted relief as having constituted cruel and unusual punishment. This Court has never ruled on the question, and as the Fifth Circuit pointedly observed in the decision below, prisons and public schools are not analogous for the purposes of Eighth Amendment scrutiny. Punishment to prisoners is clearly a collateral penalty, an extension of the original criminal sanction of confinement, and thus the *Jackson* and *Nelson* cases are well within the proper analytical scope of the Eighth Amendment as expounded by this Court. Furthermore, corporal punishment to prisoners, adult or juvenile, is easily seen as cruel and unusual, since the prisoners have already lost their liberty, and no rational purpose is served by inflicting pain rather than utilizing other means of correction at the jailers' disposal, such as isolating those guilty of misbehavior. Abuse is much more likely, given the seclusion of prisoners from their families and from public scrutiny.

None of these considerations apply to public school students. The purpose of educational discipline is correction, not retribution; students are not confined and may not be isolated in cells for mischievous behavior; and parental oversight, plus public access to the schools, press



and political process all work strongly to prevent unrestrained or excessive punishment by school personnel.

We turn now to two arguments made by petitioners, both based on phrases lifted out of context from Chief Justice Warren's opinion in *Trop v. Dulles*, 356 U.S. 86 (1958). Petitioners first fasten on the word "penal" as discussed in the opinion, and assert that corporal discipline in schools must be seen as penal in purpose, and therefore amenable to Eighth Amendment consideration. The whole quotation from the *Trop* opinion reads (356 U.S. at 96) :

"In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrong-doer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose."

We have pointed out earlier that the Chief Justice only reached this formulation of a test of purpose *after* concluding that the Eighth Amendment had been invoked. Nevertheless, meeting petitioners' argument on its own terms, it borders on nonsense to say that the "purpose" of corporal discipline in public schools is penal in nature. The new Florida statute which defines corporal punishment embodies the universal understanding of the term, as "... the moderate use of physical force or physical contact by a teacher or principal as may be necessary to maintain discipline or to enforce school rules". Florida

Statutes sec. 228.041(28), as enacted by Laws of Florida, Ch. 76-236 (set forth *supra* at p. 3). The policy of the Dade County School Board in this case, again quoted out of context in petitioners' brief, provides this definition:

"Punishment in the general sense is the inflicting of a penalty for an offense. Corporal punishment is generally applied to the body of the offender or is physical punishment as opposed to other forms of punishment and is administered as a means of changing the behavior of the student. Therefore, it is important to analyze whether or not this goal will be accomplished by such action."

Public educational systems function to transmit knowledge, and to guide the young in their development of morals and values. Those charged with the administration of public schools are not employed to punish, nor concerned with the correction of conduct, except secondarily. Nevertheless, schools cannot carry out their educational functions, as charged by legislatures and demanded by the public, in an environment of disorder, defiance, or disruption. The obvious purpose of corporal punishment, then, is to provide one method, among various alternatives, of maintaining the atmosphere of order and decorum which is indispensable to the life of the educational process.

The second misuse by petitioners of phraseology from the *Trop* opinion begins with the excerpt (356 U.S. at 100) :

"Fines, imprisonment and even execution may be imposed depending upon the enormity of the

crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect."

Petitioners then deftly excise one sentence from Justice Powell's dissent in *Goss v. Lopez*, 419 U.S. 565 (1975). We give the context here:

"The State's interest, broadly put, is in the proper functioning of its public school system for the benefit of *all* pupils and the public generally. Few rulings would interfere more extensively in the daily functioning of schools than subjecting routine discipline to the formalities and judicial oversight of due process. *Suspensions are one of the traditional means—ranging from keeping a student after class to permanent expulsion—used to maintain discipline in the schools.* It is common knowledge that maintaining order and reasonable decorum in school buildings and classrooms is a major educational problem, and one which has increased significantly in magnitude in recent years."

(419 U.S. at 591)

The sentence shown in emphasis above is then used by petitioners to support the startling view that only non-physical punishment is customary, and so corporal discipline is "suspect" and so presto!—the Eighth Amendment is invoked.

We hardly think that in the context of his reasoning, Justice Powell meant to exclude corporal punishment from the range of "traditional means" used to maintain school

discipline. As we have already shown, it is abundantly obvious that corporal discipline is both traditional, and widespread as accepted current practice. It cannot reasonably be viewed as "constitutionally suspect". On the other hand, if the Court is asked to focus only on *severe* corporal punishment as non-traditional and disproportionate and therefore "suspect", let us consider the implications of this approach. What about other severities in treatment which could equally be claimed as "suspect"? Would a non-traditional long-term suspension or expulsion from school for chewing gum in the classroom be suspect and thus trigger an Eighth Amendment inquiry? If a teacher punishes a student for minor misbehavior by imposing failing grades and preventing his graduation, the student suffers a severe hardship, but has the teacher violated the Eighth Amendment?

These extensions of petitioners' logic demonstrate again the improvidence of declaring the Eighth Amendment open to controversies arising out of school discipline. Mere tortious conduct capable of resolution in the state courts would be elevated to constitutional status. Every student disciplined by a teacher would have access to the federal courts for a determination whether a cruel and unusual punishment had taken place. A fresh new flood of federal litigation would be reasonably foreseeable, with a new host of difficulties for the trial and appellate judges, who would be fully into the business of deciding when and whether five or ten or more licks on the backside should become "cruel and unusual", when an assault is transformed into an unconstitutional assault, and how to charge juries to make nice constitutional distinctions.



The difficulties multiply. If the Eighth Amendment applies to school disciplinary incidents, then it logically should apply to any other incident of alleged excess by any other state official acting outside the realm of punishment connected with crime. The traffic officer who punches a motorist during an argument over a speeding ticket would violate the Constitution. Policemen, firemen, security guards or state building custodians who manhandle unruly members of a crowd while performing civil disciplinary duties would be candidates for constitutional litigation. The further development of "federal tort law" would benefit immensely. As Chief Justice Burger's famous phrase reminds us:

"All that is good is not commanded by the Constitution and all that is bad is not forbidden by it."

*Palmer v. Thompson*, 403 U.S. 217  
at 228 (1971).

We do not mean to say that the prospect of a new onslaught of federal litigation is in itself reason enough to support an exclusionary interpretation of the Eighth Amendment. We do maintain that petitioners' attempt to inject school punishment cases within the bounds of the Amendment is a most drastic new reading of the intent and compass of this constitutional clause, and would open it to new ranges of approach and scope that are as broad and long as they are unforeseeable.

#### C. THE PUNISHMENTS IN THIS CASE WERE NOT EXCESSIVE BY ANY CON- STITUTIONAL VIEW.

Because the issue framed by the Court in granting the writ of certiorari is *whether* the Eighth Amendment

applies to severe corporal punishment administered as discipline, we have purposely not tried to argue that the particular punishments stressed by petitioners from the testimony of some of the students were not "cruel and unusual". If this Court finds the Eighth Amendment to extend to school discipline, presumably the case will be remanded for evidence by the defendants and rulings based upon such guidelines as the Court may establish.

In view of petitioners' heavy suggestions of hair-raising brutality, however, two points are worth making here. The District Judge who tried this case assumed that the Eighth Amendment *could apply* to corporal punishment in the public schools. Nevertheless, in dismissing the class action after hearing the plaintiffs' evidence, and while noting that some abuses had been shown, he concluded:

"Corporal punishment of public school students, neither in and of itself, nor as prescribed and regulated in the Dade County School Board's policy and regulation, nor as administered in the school system, constitutes 'cruel and unusual punishment' within the intent of the Eighth Amendment to the Constitution. Considering the system as a whole, there is no showing of severe punishment degrading to human dignity, nor of the arbitrary infliction of severe punishment, nor of the unacceptability to contemporary society of corporal punishment in the schools, nor of excessive or disproportionately severe punishment."

(App. 155)

As for the individual actions by Ingraham and Andrews, the judge found:

"Plaintiff Ingraham's case rests on one instance of punishment, during which he received 20 licks with a wooden paddle, which produced a painful and serious hematoma on his buttocks. Plaintiff Andrews was paddled several times, receiving no more than 5 licks on any one occasion. The paddlings caused painful bruises on Andrews' buttocks.

The undisputed facts regarding Ingraham and Andrews cannot demonstrate the elements of severity, arbitrary infliction, unacceptability in terms of contemporary standards, or gross disproportion which are necessary to bring 'punishment' to the constitutional level of 'cruel and unusual punishment'. Therefore, a jury could not lawfully find that either of these plaintiffs sustained a deprivation of rights under the Eighth Amendment."

(App. 148-149)

## II

CONSTITUTIONAL DUE PROCESS PROCEDURES PRIOR TO ANY USE OF CORPORAL DISCIPLINE IN PUBLIC SCHOOLS ARE NOT THEORETICALLY REQUIRED NOR WORKABLE IN PRACTICE.

A. THE ISSUE BEFORE THE COURT IS WHETHER EACH AND EVERY INCIDENT OF CORPORAL DISCIPLINE DEMANDS PROCEDURAL DUE PROCESS.

As a prelude to discussing the procedural due process theories which petitioners advance, it is first necessary to clarify the problem which confronts the Court. The question as presented and argued by petitioners is internally paradoxical, and distorts the issue. Paraphrased, the question posed is whether the infliction of *severe* corporal punishment must be preceded by due process procedural steps mandated by the Fourteenth Amendment. Obviously enough, petitioners would not concede—nor would we contend—the converse proposition that preliminary procedural steps would legitimize the subsequent application of *severe* punishment. A rule of constitutional law which only required notice, a hearing, and other preliminaries as guarantees before excessive punishment would be foolish.

Petitioners recognize this dilemma and attempt to skirt the issue by creating their own custom-made definition of severe punishment "in the due process sense" (Pet. Brief p. 44, note 19). They offer this definition as "the infliction of bodily pain by an instrument designed to cause such pain", and do not include in the definition "a brief hand spanking or a slapped face". The argument is then launched without further justification of this artifice, or any examination of its theoretical and practical difficulties. In their focus on the uncommon instances of punishment, petitioners manage to ignore the ambiguities of their definitional premise. It is not clear whether the disciplinarian's hand is regarded as an approved instrument, and may be used without Fourteenth Amendment strictures, nor how a "brief hand spanking" is defined, nor how a slapped face comes to be exempted from due process. The definition places the paddle afoul of the Fourteenth Amendment, but leaves us without guidance as to the use



of rulers, blackboard pointers, gloves, or the like. The underlying question, left unattended, is whether the Supreme Court is being asked to classify and particularize a list of approved and unapproved kinds of corporal discipline and types of instruments—or whether the Court is being asked just to ignore these petty details and leave schoolteachers throughout the country to wonder when the due process clause applies in practice.

Petitioners' artificial and problematic definition simply will not do. It seems plain to us that the true issue before the Court is whether the Fourteenth Amendment mandates due process procedural requirements before *any* corporal punishment may be administered to public school students. (The National Education Association, in its brief as *amicus curiae* in support of petitioners (p.13) flatly contends for procedural rules "whenever corporal punishment is to be administered.") So understood, the issue not only becomes clear in its dimensions, and in its implications for state and local control of disciplinary measures in the schools. It also serves to illustrate the fallacy of dealing with the question, as do the petitioners, by stressing the exceptional instances of unreasonable punishment which may occur. Indeed, petitioners concede in their brief (p. 48) that "it cannot be said, except for Drew Junior High School, that severe corporal punishment in Dade County Schools was a common occurrence". That concession is in accord with the findings of the District Judge, who noted some abuses of the School Board policy (App. 152) but held that corporal punishment as administered throughout the school system was appropriate by Fourteenth Amendment standards (App. 155-156).

The point we make here is that exceptional instances of excessive punishment to students are aberrations, contrary to the intended place and purpose of corporal discipline in the schools, and the attempt to cure the aberrant cases by constitutional due process doctrine can be likened to the treatment of boils by the prescription of handcuffs. The handcuffs not only won't cure the boils, but they prevent the patient from attending to his ordinary business needs. No sensible due process rules can be devised to prevent only the extraordinary incidents of corporal punishment, and the mistaken stress on one out of 237 schools in Dade County led the original panel of the Fifth Circuit to an utterly unrealistic and unworkable conclusion. The panel in its opinion laid down due process requirements including such things as the production of eyewitnesses, the calling of witnesses on behalf of the student, and sufficient inquiries to insure that the student "is guilty beyond any reasonable doubt" (App. 175-176). Petitioners now do not even suggest a return to the panel's array of due process procedures, but they continue with the mistaken conception that because occasional excesses may occur, the prescription of constitutional procedures is the only and inevitable answer. Again, we submit that the excesses can and should be dealt with by resort to state remedies which are traditional and fully available. The question of need for procedural due process as a blanket prescription, which emerges as the real issue here, thus remains to be discussed, and we will follow the traditional two-step analysis used by petitioners.

B. ROUTINE CORPORAL PUNISHMENT PRESERVES THE STUDENT'S PROPERTY INTEREST IN EDUCATION, AND HAS TRIVIAL EFFECT ON HIS LIBERTY.

Where it not for the Court's decision in *Goss v. Lopez*, 419 U.S. 565 (1975), we would have thought it not seriously arguable that public school students are possessed of a guaranteed right to be immune from corporal discipline for misbehavior except after *constitutionally required* procedural steps.

Except for *Goss*, we would have rested with the assurance given by the Court in *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968):

"Judicial interposition in the operation of the public school systems of the Nation raises problems requiring care and restraint . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."

Except for *Goss*, we would have relied upon the broad principle stated in *Tinker v. Des Moines School District*, 393 U.S. 503, 507 (1969):

"[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."

But the assurance of *Epperson* was honored only by distinction in the majority opinion in *Goss*, and the principle of *Tinker* was only cited regretfully in the dissent written by Justice Powell. Although we hope their vitality remains, neither of these general statements now provides its former reassurance that routine school disciplinary measures are to remain free from judicial oversight.

It is not for us, we think, to suggest that *Goss* be overruled so soon, although post-analysis of its ramifications is certainly appropriate for the Court's perspective. The most thoughtful critique of the decision is to be found in an extensive article by Professor Wilkinson, *Goss v. Lopez: The Supreme Court as School Superintendent*, 1975 Supreme Court Review 25.

It is for us, however, to urge with all earnestness that in the realm of judicial interposition in the discretionary spectrum of school disciplinary problems, this Court has gone just as far as it ought to go. Having constitutionalized the procedures for school suspensions, the Court should not be induced to venture still further into the thicket of educational decision-making. This is where the line should be drawn, or the Court is surely in for still more seductions to extend procedural due process to the many other routine and necessary school decisions made daily by teachers and principals throughout the land.

Having said this, we will deal with the problem of corporal discipline now at issue. Preliminarily, we should point out that the only corporal punishment case previously ruled upon by this Court has affirmed the authority of school administrators to choose corporal punishment as a disciplinary measure, in spite of parental objections.



*Baker v. Owen*, 395 F.Supp. 294 (M.D. N.C. 1975), *aff'd* 423 U.S. 907 (1975). Although the district court in *Baker v. Owen* found "minimal procedures" to be required prior to punishment, that issue was not before this Court, and the summary affirmance did not constitute a ruling on the issue, as the Fifth Circuit pointed out in its decision below (App. 187-188). Examination of the Jurisdictional Statement filed in *Baker v. Owen* proves that only the issue of parental consent was presented, and by the clear terms of Supreme Court Rule 15(1)(c) only that question was at bar.

One other district court, in an unreported decision, has in dicta indicated its view that a student must know the rule under which he is to be punished, and in cases of doubt as to identity of an offender, further inquiry should be made. See *Whatley v. Pike County Board of Education*, Civil Action No. 977 (N.D. Ga. 1971).

The *Baker* and *Whatley* cases are the only authorities for the view that constitutional due process attaches to corporal discipline in schools. No Court of Appeals has so held, and the other federal courts which have directly ruled on the issue have rejected the idea, as has the Fifth Circuit in the present case. *Sims v. Board of Education*, 329 F.Supp. 678 (D.C. N.Mex. 1971); *Gonyaw v. Gray*, 361 F.Supp. 366 (D.Vt. 1973); *Ingraham v. Wright* (App. 180). Cf. *Sims v. Waln*, — F.2d —, (No. 75-1383, 6th Cir. June 15, 1976); *Coffman v. Kuehler*, 409 F.Supp. 546 (N.D. Tex. 1976).

Utilizing traditional due process analysis, with the *Goss* decision as the bench mark, we look first to the right or interest asserted by petitioners as having protected

status. A glaring difference immediately appears between the nature of the penalty involved in *Goss*, compared to routine corporal discipline. Suspension from school removes a student from the educational process. Corporal punishment imposes temporary bodily discomfort while keeping the student in school and at work.

The Court in *Goss* found suspension to be a deprivation of a substantial property interest (education) conferred by the state of Ohio, with consequential effects upon the student's employment prospects and reputation. The majority of the Court were clearly concerned that suspensions were, for the students, *exclusion from the educational process*. In contrast, the very purpose of corporal punishment as a disciplinary measure is to avoid exclusion of the student from his studies. He suffers no property loss, and his interest in being free from pain in the posterior, while real enough to the misbehaving student, has no realistic implications for his future employment or standing in the community.

Petitioners make a stab at finding a "property interest" here, by suggesting that James Ingraham was "driven from school" by his paddling, and thus deprived of education while out of class. Aside from the utter lack of proof that Mr. Wright intended such a result, and some doubt about whether Ingraham could have come back to school earlier if he had really wanted to (no one forbade his return), this argument again shows how the due process analysis is only confused by dwelling on out-of-the-ordinary punishments. The inevitable result of suspension is some loss of education — the common result of corporal discipline is correction only, with no break in classroom instruction, and certainly no deprivation of

educational entitlement. Before leaving this point, we note that the evidence at the trial utterly failed to show any educational retardation, much less deprivation, stemming from corporal punishment. With the exception of one child who repeated a grade for reasons unexplained (R. 587), the other Drew Junior High students progressed more or less normally. Ingraham continued in school to senior high until he was committed to Juvenile Hall for threatening a teacher (App. 88-89). Andrews progressed to senior high, where he was expelled for having a knife (App. 90, 117). The other students showed a consistent pattern of progression through school (R. 433-434, 438-439, 462, 488, 490, 544-545, 643, 644, 807-808, 848-849, 862-863).

Petitioners' main thrust is an effort to find a "liberty" interest of constitutional dimensions. In this connection, the analysis must heed the Court's decision, subsequent to *Goss*, in *Paul v. Davis*, — U.S. —, 96 S.Ct. 1155 (1976). The Court there holds that for a federal cause of action to arise under 42 U.S.C. sec. 1983, there must be a deprivation of a *right*, secured either by state law or the Constitution, not merely an incident of tortious conduct by a state employee. Neither the law of Florida nor the Fourteenth Amendment can be said to guarantee a public school student the right to attend school free of physical discomfort as punishment for misconduct. As we have noted earlier, Florida law now clearly approves, as well as regulates, corporal discipline in schools.

Perhaps with this problem in mind, petitioners first look to the Fourth Amendment, and see it as somehow embodying the liberty right they seek. This is startling for two reasons. First, no court has ever perceived school

discipline as such an affront to privacy or dignity as to offend the Fourth Amendment, and neither of the cases relied upon by petitioners lends the slightest support to their notion. In both *Schmerber v. California*, 384 U.S. 757 (1966) and in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court dealt with police search-and-seizure issues, obviously within the literal scope of the Fourth Amendment, and in both cases the disputed evidence obtained by the police was declared admissible and the resulting convictions were affirmed. Secondly, aside from being inserted in the plaintiffs' complaint which began this suit in 1971, the Fourth Amendment has never been mentioned again, and was neither argued to nor considered by the Court of Appeals. Petitioners' resort now to the Fourth Amendment is too late and entirely too far-fetched.

In further pursuit of a liberty interest, petitioners attempt to find in corporal punishment some constitutional trespass to physical integrity and reputation, and also suggest psychological harm as a factor.

It is appropriate, we think, to remember first that the Fourteenth Amendment literally prescribed that no state shall "deprive" any person of liberty. Deprive means *take away*, and whether we think in terms of property or liberty, the temporary detention and discomfort which accompany routine corporal discipline cannot be seen to meet the constitutional text, except by an exercise of desire rather than reason. The Court's recent flow of due process cases, including *Goss*, can consistently be read as the imposition of notice and hearing requirements only where an actual loss, either of property or genuine status,



is threatened by state action. See *Wilkinson, Goss v. Lopez: The Supreme Court as School Superintendent*, 1975 Supreme Court Review 25, 50-52.

If we must look beyond textual definition, however, petitioners' theories of harm hardly establish that ordinary corporal punishment sufficiently implicates a student's liberty interest so as to invoke the Fourteenth Amendment and procedural forms as a consequence. In the first place, a routine incident of spanking or paddling is indeed a trivial and transitory physical event. It cannot be equated with a 10-day suspension as "a serious event in the life" of the child. See *Goss, supra* at 576. A spanked child would see the matter differently, of course, but we cannot read the Constitution with childish eyes without risking childish results. The answer to the child, and the answer to petitioners, is:

"The State's generalized interest in maintaining an orderly school system is not incompatible with the individual interest of the student. Education in any meaningful sense includes the inculcation of an understanding in each pupil of the necessity of rules and obedience thereto. This understanding is no less important than learning to read and write. One who does not comprehend the meaning and necessity of discipline is handicapped not merely in his education but throughout his subsequent life. In an age when the home and church play a diminishing role in shaping the character and value judgments of the young, a heavier responsibility falls upon the schools. When an immature student merits censure for his conduct, he is rendered a disservice if appro-

priate sanctions are not applied or if procedures for their application are so formalized as to invite challenge to the teacher's authority — an invitation which rebellious or even merely spirited teenagers are likely to accept."

*Goss v. Lopez, supra* at 592-593  
(Justice Powell dissenting).

As for the "psychological harm" apprehended by petitioners, the answer seems obvious. The one witness who expounded on this at the trial, an assistant professor of educational psychology, had the view that *all* corporal punishment could produce anxiety, frustration, hostility, and so forth. This may be a policy reason for abolishing corporal discipline in schools, but no amount of due process procedural requirements will solve the problem, if it is a problem. Procedural steps and delays, even "informal" ones, would be calculated to worsen, rather than avoid mental distress to the candidate for corporal punishment.

Finally, petitioners fasten on the idea that corporal discipline injures the reputations of school children, and inflicts a lasting stigma. In *Goss*, the Court found suspensions, once recorded, capable of damaging a student's standing with his peers and teachers, and of interfering with later opportunities for higher education and employment. The present case, however, presents no such picture. There is nothing in the record, nor in common experience, to support the idea that a paddling brings upon the student anything more serious than the kidding of his friends. James Ingraham's testimony on this, quoted in petitioners' brief with due solemnity (p. 47), is adequate proof of our point. Male chauvinists among us, if any are left, might

remember a paddling by the principal as a mark of honorable achievement in the eyes of one's boyhood friends. Not to be facetious, though, it passes belief that school spankings can be perceived as having *any* damaging or lasting consequences to reputation, honor or integrity. Some of the students who testified below said they were embarrassed by their punishments — and others were not. James Ingraham was ashamed to tell his mother (App. 77), but not embarrassed when paddled with other class members (App. 85). Roosevelt Andrews felt "normal" about being paddled in the eighth grade (App. 98) and said being whacked with a ruler in elementary school helped him behave (App. 118). Is this sort of juvenile mishap really to be the source of constitutional concern?

Nor is there any merit to the suggestion that future education or employment are jeopardized by corporal discipline. Petitioners do not even try to meet this test as set forth in *Goss*, but the National Education Association, in its grief as *amicus curiae*, notes that the Dade County School Board policy requires a log to be kept by each principal of the details of each instance of corporal punishment (App. 132). The NEA argues that the record could later mar a student's reputation. Thus, a regulation adopted to insure reasonableness of punishment and better administrative controls is turned about to predict harm to the students! The argument is false, however, for this information is protected from publicity under both state and federal law. The cumulative records of Florida students, which contain their educational history and progress information (App. 31), also contain records of disciplinary measures. See, for example, the cumulative records of James Ingraham and Roosevelt Andrews, which were introduced in evidence. Pl. Exh. 12, 13; R. 253. Florida Statutes sec.

232.23 limits inspection of these records to some school district personnel, the pupil's parent or guardian, a court, and persons authorized in writing by the parent, guardian or principal. In addition, the new Family Educational Rights and Privacy Act of 1974, known as the "Buckley Amendment", restricts the release of education records or "personally identifiable information" (on pain of losing federal funds), except to specified persons and agencies,<sup>5</sup> without written consent of the parents, or of the student himself if over the age of eighteen. 20 U.S.C. sec. 1232g.

Having dealt with the illusory "right" which petitioners claim for students faced with corporal discipline, it should be in order to look at the interests of school administrators and the public in maintaining order and a climate conducive to learning in the schools. The rising concern in the nation over disorder and disruption in the public schools is amply documented and justified. Justice Powell, dissenting in *Goss*, made and supported this point fully. See *Goss v. Lopez*, 419 U.S. 565 at 592. See also the discussion and sources in Wilkinson, *Goss v. Lopez: The Supreme Court as School Superintendent*, 1975 Supreme Court Review 25, 64-66. This is not to argue for more and harder beatings, but only to suggest that in a consideration of ordinary, garden-variety corporal discipline, the so-called liberty interest of the student has to be seen in the perspective of the needs of hard-pressed educators for effective and effi-

<sup>5</sup>Among the authorized recipients of information are "officials of other schools or school systems in which the student seeks or intends to enroll". Parents, however, have a right to a hearing to challenge the content of the record. In any event, only speculation supports the assertion that notations of spankings in school are likely to lead college registrars to deny admission to students otherwise qualified.



ent disciplinary alternatives. Corporal punishment is one such alternative. It is not likely to remain so if constitutional procedures, even "informal" procedures, are mandated for any paddling of whatever sort, for whatever offense. History and state legislative policy clearly show that American society and its laws have arrived at a balance of interests in respect to school punishment, which approves corporal discipline and trusts educators to administer it under state and local control, while providing remedies against abuse. This Court, we submit, should not destroy that balance by now imposing constitutional mechanics in this area of educational authority.

Our conclusion here is strongly reinforced by this Court's very recent decision in *Bishop v. Wood*, \_\_\_\_ U.S. \_\_\_\_, 96 S.Ct. 2074 (1976). The Court there found neither a property nor liberty interest sufficient to invoke due process procedures on behalf of a discharged "permanent employee" of a city, even assuming that he was discharged for false or mistaken reasons. In language which precisely makes our point here, Justice Stevens observed:

"The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error."

(96 S.Ct. at 2080)

### C. EVEN "MINIMAL" PROCEDURES BY CONSTITUTIONAL DECREE ARE INAPPROPRIATE AND SUPERFLUOUS, AND IN THE END SELF-DEFEATING

Although it is our firm position that constitutional due process procedures are not required in connection with corporal discipline, the mechanics suggested by petitioners deserve some attention. It will be seen, we believe, that even the "minimal" steps suggested are neither necessary, desirable, nor workable.

#### 1. Notice and Opportunity To Be Heard

It is seductively simply for petitioners to recommend this classic due process element, and to propose it as some sort of informal dialogue. A common sense view of the proposal discloses it to be ambiguous and superfluous.

Petitioners first insist that a code of discipline is mandatory, so that a student will be informed beforehand that "specific misbehavior" could result in corporal punishment. This may sound reasonable at first blush, but as a *constitutional* principle in the public school context it is probably impossible, and certainly unclear. We would suggest that an attempt to draw a list of infractions as notice of corporal offenses would be a futile exercise, for it would either be too broad and general to be informative to young children ("misconduct in class", for example), or else endless in its particularity and in the final analysis, incomplete to encompass all possible variations of student mischief. It would remove judgmental discretion by educators and might even increase the incidence of corporal punishment by allowing unimaginative or overly-zealous school officials simply to check the list and pick up the

paddle, rather than trying to understand and deal flexibly with a student's behavior problem.

Petitioners next suggest that the student need only be told what he is accused of doing and the basis of the accusation, and that the hearing must be at least an informal give and take before punishment. The suggestion makes sense, but it is totally unnecessary as a constitutional rule for public schools. For one thing, the written regulation of the Dade County School Board (App. 131) has required for years that the student in every case "be told of the seriousness of the offense and the reason for the punishment". For another, it is certainly within common understanding and experience of teacher-pupil relationships that some "give and take" will happen whenever an educator proposes to impose corporal discipline. Teachers and students are not opponents or adversaries, and it must be a rare case when a youngster is actually unaware of the misconduct which is charged to him, and has no chance at all to deny it or tell his story. The record of the students' testimony in this case proves the emptiness of petitioners' contention. Neither Ingraham nor Andrews was in doubt about the acts of misconduct for which they were paddled. (App. 72, 85-87, 93-95, 97-98, 100, 102, 105-106, 107-110, 113).

With no clear exceptions from the often confusing testimony, all the other Drew Junior High students knew why they were being punished, even though some denied misconduct or thought the discipline unfair. (R. 418, 430-431, 435, 455, 467-469, 485, 493-496, 499, 501, 516-517, 522, 523, 546-547, 554, 588, 594, 604, 621, 624, 630-631, 633, 637-639, 642, 645, 647, 649-650, 653, 659, 809, 817, 822, 850, 854, 864, 867-870, 877-879). If we concede that

in some cases the punishments may have been mistaken or inequitable, our point remains that the essential rudiments of notice and opportunity to speak are actually inherent in the realities of school-discipline situations. Thus the "hearing" procedure suggested by petitioners, if it is to be as truly informal as they say, adds nothing to common practice. It can even be seen as illusory, in terms of results. The imposition of a constitutional requirement for such a hearing is highly unlikely to affect many substantive decisions made by those hardy administrators who continue to use corporal punishment as a disciplinary tool. On the other hand, it opens a fertile field for new federal damage suits, in which the student is pitted against the teacher in testimony about whether or not the student's constitutional rights were violated because he was or was not advised of his "specific misbehavior," and was or was not listened to before he was punished.

It is also appropriate here to refer again to the new Florida legislation, Laws of Florida Ch. 76-236, which in authorizing corporal punishment, provides as a statutory procedure that punishment must be administered "only in the presence of another adult who is informed beforehand, and in the student's presence, of the reason for the punishment". The same act, in requiring each Florida school board to adopt a code of student conduct for distribution to school personnel, students, and parents, specifies that the code shall contain, among other things, ". . . procedures to be followed for acts requiring discipline, including corporal punishment . . ." While these requirements would not entirely satisfy the petitioners' definition of notice and hearing, it is clear that the state itself is choosing to regulate corporal discipline directly and through its school boards.



Perhaps the question then becomes why a federal rule is unacceptable, if the state is itself providing some elements of procedure. The first answer is found again in the basic commitment to state and local control of education without unnecessary judicial interference, which this Court recognized in *Epperson v. Arkansas*, 393 U.S. 97 (1968), and *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), and gave at least honorable mention in *Goss v. Lopez*, 419 U.S. 565 at 582 (1975). State and local educational authorities, faced with many different kinds of student trends and disciplinary problems, may well wish to experiment with more or less regulation of routine corporal discipline. It is quite another thing to fasten a constitutional standard on the schools of the nation, and freeze educational authority into a federal mold.

Even more important here is the foreseeable impact upon the teachers and administrators in the schools. There can be no doubt that federal mandates, and the prospect of federal litigation, are chilling to lay educators. Beset already with restrictions and threats to their authority, educators are also acutely aware of the sword of personal liability which hangs over their heads since the Court's decision in *Wood v. Strickland*, 420 U.S. 308 (1975). If they are now to be told that the United States Constitution requires due process procedures prior to every use of corporal discipline, no matter how bland the description of the process may be, school officials are necessarily going to see each choice of corporal punishment as laden with the risk of being haled into federal court on claims of procedural flaws. The results are likely to be in two directions, both undesirable. Conscientious educators, in order to protect themselves in using corporal punishment, will over-formalize and document the pre-spanking procedures, and thus

prolong the anxiety of the students and defeat the proper function of the discipline as swift and non-disruptive of the educational process. This would have the added effect of further diverting school resources and administrative time from educational concerns, a factor recognized by both the majority and dissenting opinions in *Goss v. Lopez*, 419 U.S. 565 at 583, 594 (1975). On the other hand, less imaginative but still frightened administrators will find it simpler to discard corporal discipline as a viable measure, and either ignore misconduct or turn to more stringent penalties such as suspension or expulsion from school.

Neither of these alternatives is sensible as a goal, but they both are predictable as results of a new federal mandate for a prior hearing in every case of corporal discipline. The second alternative, likely enough, would tend indirectly to the abolition of corporal punishment in the schools. This would no doubt be satisfactory to petitioners, but it obviously would be at cross-purposes with the needs of American society as clearly expressed in its legislation and common law.

## 2. A Neutral Arbiter of Punishment

Petitioners suggest the rule that "a neutral person decide the need for punishment and impose it if necessary". This is a fresh new conception, for no court has yet seen this need, not even the panel of the Fifth Circuit which originally considered this case and suggested a formidable list of other due process procedures. The Dade County School Board regulation (App. 131) places the responsibility on the school principal to determine the need and authorize the punishment in each case. The new Florida law (p. 2, *supra*) is less strict, requiring the principal to

approve corporal punishment in principle before it is used, but not in each specific instance. Surely this is enough, without the addition of a constitutional arbiter in each and every case.

There is little else we can say about this, except that the suggestion would surely guarantee a formal process, contrary to petitioners' avowed intent. The intervention of a "neutral" party to adjudicate between teacher and student, or between principal and student, would necessarily involve the delay, complication of schedules, diversion of resources, student anxiety and loss of instruction, and adversary atmosphere that even petitioners see as undesirable. This notion can only be seen as expensive, time-consuming and needless in the context of public school operations.

### CONCLUSION

The Court of Appeals for the Fifth Circuit first introduced the Constitution to the campus, and has never been slow to recognize and articulate the essential rights of students within the context of public educational institutions. *See generally* Wright, *The Constitution on the Campus*, 22 Vanderbilt L.Rev. 1027 (1969). Now that court, sitting *en banc*, has clearly and carefully drawn the line and refused to read into the Constitution new and inappropriate and unnecessary avenues for fresh traffic in federal litigation over incidents of corporal punishment in the schools.

Punishments will occasionally exceed moderate proportions, but it does not follow that these incidents must reach constitutional proportions. Adequate state remedies are available, and the Eighth Amendment should not be warped from its true intent and meaning.

By any realistic appraisal, the time-honored and almost universal use of moderate corporal punishment as a prompt disciplinary measure in public schools is a rational alternative to more drastic exclusionary devices. The Fourteenth Amendment does not command, nor does experience suggest, the necessity that federal courts must lay down formal due process procedures to satisfy the emotional notion that the transitory discomfort of a paddling somehow deprives a school child of a constitutional right.

The *en banc* decision below is comprehensive and correct and should be affirmed.

Respectfully submitted,

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IN THE  
Supreme Court of the United States  
OCTOBER TERM, 1975

No. 75-6527

JAMES INGRAHAM, by his mother and next friend,  
ELOISE INGRAHAM, and ROOSEVELT ANDREWS, by  
his father and next friend WILLIE EVERETT,  
*Petitioners,*

v.

WILLIE J. WRIGHT, I; LEMMIE DELIFORD; SOLOMON  
BARNES; EDWARD L. WHIGHAM; and THE DADE  
COUNTY SCHOOL BOARD,  
*Respondents.*

Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL EDUCATION  
ASSOCIATION AS AMICUS CURIAE IN SUPPORT  
OF PETITIONERS

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---

**Certiorari to the United States Court of Appeals for the Fifth Circuit**

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**BRIEF OF THE NATIONAL EDUCATION  
ASSOCIATION AS AMICUS CURIAE IN SUPPORT  
OF PETITIONERS**

---

**CONSENT TO FILING**

This amicus brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of all parties to the case.

**INTEREST OF AMICUS CURIAE**

The National Education Association ("NEA"), founded in 1857 and chartered by act of Congress in



1906, is the nation's oldest and largest organization of educators. NEA's membership exceeds 1.7 million nationwide. NEA's charter purposes are to "elevate the character and advance the interests of the profession of teaching and to promote the cause of education in the United States." To this end NEA seeks to protect the constitutional rights of both teachers and students.

The questions presented in this case are: (1) whether severe and excessive corporal punishment administered by public school officials is subject to the Eighth Amendment prohibition against cruel and unusual punishment, and (2) whether a public school official may inflict corporal punishment on a student without first according the student basic elements of procedural due process.

As a national organization of educators, NEA has a unique interest in these issues. At its 1976 Convention, NEA adopted Resolution 76-18, supporting disciplinary procedures that "protect the student's right to a fair hearing" and "provide the classroom teacher with the authority to maintain internal classroom management." NEA believes that in administering corporal punishment public school teachers and administrators are, and in the interest of sound education should be, subject to Eighth Amendment strictures. NEA believes that inflicting such punishment without elementary due process violates the Fourteenth Amendment and is inimical to the cause of education.

This Court's decision will have significant impact on whether discipline in the public schools comports with the Constitution.

### STATEMENT OF FACTS

This suit involves corporal punishment of public school students at Charles R. Drew Junior High School, Dade County, Florida, during the academic year 1970-71. By any standard the punishment was severe and excessive. By any standard the student offenses, actual or assumed, were minor. In no case was the student accorded a hearing of any kind. The students whose punishments the Fifth Circuit panel reviewed (498 F.2d at 255-59) included:

*James Ingraham.* While two school administrators held Ingraham face down on a table, the principal beat him 20 times on the buttocks with a wooden slab, called a "paddle." The beating, euphemistically called "paddling," caused a large oozing hematoma that required three hospital treatments; Ingraham missed ten days of school and was unable to sit comfortably for three weeks. His offense (of which he claimed innocence) was that he was slow to leave the auditorium stage.

*Roosevelt Andrews.* A teacher stopped Andrews, told him he could not possibly get to his next class on time, and took him to an administrator. The latter sent him to a bathroom, where about 15 boys lined up against the urinals were being "paddled." Andrews told the administrator he would have made it to class, if the teacher had not stopped him. The administrator told Andrews to bend over. When the student refused, the administrator pushed him against a urinal, hit his buttocks, his leg, his arm and the back of his neck.

Andrews was "paddled" at least twice for not wearing certain attire prescribed for physical education class—white socks on one occasion and tennis shoes on

another. On each occasion Andrews tried to explain that his footgear had been stolen.

On another occasion, the principal wielded his "paddle" on Andrews' wrist, causing painful swelling that required medical treatment. Andrews couldn't use his arm for about a week. His offense was breakage of glasses in sheet metal class. Andrews claimed the breakage was not his fault.

*Daniel Lee.* An administrator, while chastising a line of students, called Lee over to "get a little piece of the board." Lee asked what he had done. The administrator grabbed him and, while trying to bend him over a chair,<sup>1</sup> struck him four or five blows on the hand. The blows caused a bone fracture and painful swelling; at trial the court noted that the hand remained disfigured.

*Reginald Bloom.* An assistant principal beat Bloom's buttocks so repeatedly (about 50 times) and so hard the boy could not sit down; the buttocks were black and blue and swollen, requiring medical attention and ice-pack treatments; Bloom could not sit down without pain for about three weeks. This punishment was for an obscene phone call to a teacher. Bloom denied making it; later, another boy confessed.

*Rodney Williams.* An administrator hit Williams five or ten times on the head and back with a paddle, then hit him with a belt. Williams needed an operation to remove the lump that developed where his head was struck. Williams lost about a week of school. His

<sup>1</sup> Drew students were often required to "hook up" for paddlings—that is, to bend over the back of a chair and hold the front of the seat. If a blow disturbed this posture or caused the pupil to move the chair, he received extra blows.

offense was that he wiped off his seat in the auditorium before sitting down. On other occasions beatings by the principal and an assistant principal caused Williams to cough up blood. The boy was sickly and on one such occasion he required hospital treatment after a 10-stroke beating left him shaking all over.

*Janice Dean.* On her first day at school, Miss Dean, not knowing about seating assignments in the auditorium, sat in the wrong seat. For this offense an assistant principal hit her buttocks five times with a wooden paddle. On another occasion another administrator, who showed no knowledge of any misconduct on her part, beat her buttocks fifteen times.

*Unnamed student.* Several Drew students were called into the principal's office and accused of fighting on the way home from school. When they resisted physical beatings, the principal and two of his assistants threw one youth around the room, hitting him and throwing him on the table. They injured the youth's hand; he was out of school for two weeks.

*Group punishment.* The school administrators administered group beatings. When James Ingraham was punished for alleged slowness in leaving the auditorium stage, he was among a number of boys and girls accused of this offense; they were all taken to the principal's office and beaten. Roosevelt Andrews testified that, shortly before he was pushed against a urinal and beaten, the administrator had lined up about 15 boys against the urinals and "paddled" them all. When Daniel Lee asked an administrator what he had done to deserve a "piece of the board," the administrator was in the act of "paddling" a number of students. The same administrator gave all 15 students in a noisy typing class five "licks" apiece. Another time,



in order to find out who had been whistling in a class of more than 30 students, he "paddled" about half the class before learning the identity of the whistler. Group "paddlings" for misbehavior in the auditorium were commonplace.

### ARGUMENT

This case does not concern use of physical restraint to prevent a student from injuring persons or damaging property. It concerns physical punishment of a student for an offense, actual or assumed. NEA holds no brief against physical restraint of a student who causes or threatens violence to persons or property.<sup>2</sup> But NEA does oppose the kinds of punishment and the absence of due process disclosed in this record.

The constitutionality of the Florida statute and Dade County School Board policy, insofar as they permit corporal punishment, is not challenged and is not an issue in this case.<sup>3</sup> What is in issue is the constitutionality of *specific acts of severe and excessive corporal punishment* committed by public school teachers and administrators. In issue as well is the constitutionality

<sup>2</sup> The NEA Task Force Report on Corporal Punishment (1972) proposed a model statute which, while prohibiting corporal punishment, would expressly permit physical restraint reasonable and necessary for a teacher:

"(1) to protect himself, the pupil, or others from physical injury;

"(2) to obtain possession of a weapon or other dangerous object upon the person or within the control of a pupil;

"(3) to protect property from serious harm;

"and such physical restraint shall not be construed to constitute corporal punishment. . . ."

<sup>3</sup> An attack on abusive exercise of authority conferred by statute is not an attack on the statute's constitutionality. *Phillips v. United States*, 312 U.S. 246, 252 (1941).

of inflicting corporal punishment without first according the student fundamental procedural fairness.

NEA urges that the Fifth Circuit decision be reversed. In NEA's view, reversal will not impair school discipline; it will advance the cause of education in the United States.

### I. THE EIGHTH AMENDMENT BARS PUBLIC SCHOOL OFFICIALS FROM INFLECTING SEVERE CORPORAL PUNISHMENT ON STUDENTS.

#### A. The Eighth Amendment Applies to Acts of State Officers.

The Eighth and Fourteenth Amendments prohibit states from inflicting cruel and unusual punishment. *Woodson v. North Carolina*, — U.S. —, 44 U.S.L. WEEK 5267, 5268, 5275 (1976); *Furman v. Georgia*, 408 U.S. 238, 240-41 (1972) (per curiam); *Robinson v. California*, 370 U.S. 660, 667 (1962). It is undisputed that the principal, his assistants and the teachers under his administration at Drew Junior High School are officers of the State of Florida.

#### B. The Availability of a State Remedy for Tort Does Not Preclude a Federal Remedy for Constitutional Violation.

This action was brought under the Civil Rights Act of 1871 (42 U.S.C. §1983), which creates legal and equitable federal remedies for persons deprived of constitutional rights under color of state law. The majority opinion below refused to apply the federal remedy, partly on the ground that the students' proper basis of action was state "tort and criminal law, not federal constitutional law" (525 F.2d at 915) (emphasis in original).

That refusal is incompatible with this Court's ruling in *Monroe v. Pape*, 365 U.S. 167, 183 (1961):

It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.

### C. The Punishments Here Were Cruel and Unusual

Under color of Florida Statutes § 232.27 and School Board Policy 5144, Drew Junior High School officials inflicted corporal punishments so severe and excessive as to offend the Eighth Amendment. As noted above, the question here is not whether the Eighth Amendment protects public school students from any and all forms of corporal punishment, but whether the specific punishments in this case transgressed constitutional bounds.

The Eighth Amendment prohibits infliction of "cruel and unusual punishments." The threshold question—whether the acts complained of were punishments—is quickly answered. The acts were done pursuant to School Board Policy 5144, which defines punishment as "the inflicting of a penalty for an offense." In every case the beatings were administered as punishment for student offenses, actual or assumed. Yet the majority below held such punishment beyond the reach of the Eighth Amendment; they held the Amendment restrains only punishment of criminals, 525 F.2d at 912-15. They dismissed out of hand the opposite holding in *Bramlet v. Wilson*, 495 F.2d 714, 717 (8th Cir. 1974). The opinion states that the Amendment's use of the words "bail" and "fines" connotes only criminal sanctions; in fact bail and fines are used

in civil as well as criminal proceedings.<sup>4</sup> Unmindful that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (Warren, C.J.), the court below defines the Amendment by the terms of a single paragraph of legislative history. The error is compounded by the court's failure to take account of the Amendment's historical setting. In 1791, states punished only criminal conduct; the public school system did not yet exist. See 525 F.2d at 923 (Rives, J., dissenting).

The further constitutional question—whether the punishments here were cruel and unusual—must also be answered affirmatively. Historically this Court has considered punishment to be cruel and unusual which is either cruelly inhumane, *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1879); *In re Kemmler*, 136 U.S. 436, 447 (1890), or disproportionate to the offense, *Weems v. United States*, 217 U.S. 349 (1910). The punishments here were so severe as to be cruelly inhumane and so excessive as to be out of all proportion to the offenses. For leaving the auditorium stage too slowly, James Ingraham was disabled for ten days and required three hospital treatments for the painful hematoma inflicted on him. For asking what he had done to deserve a "piece of the board," Daniel Lee had his hand broken and disfigured. For wiping off his auditorium seat, Rodney Williams suffered a head blow that required an operation. Apparently for the breakage of some glasses, Roosevelt Andrews lost the use of his arm for a week. For sitting in the wrong auditorium seat, Miss

<sup>4</sup> *E.g.*, 8 U.S.C. § 1252(a) (bail pending determination of deportability); 11 U.S.C. § 28(a) (bail pending examination of a bankrupt); 28 U.S.C. § 1826(b) (bail pending appeal in civil contempt



Dean suffered a fivefold thrashing on her buttocks with a wooden board.<sup>5</sup>

If such punishments had been inflicted on convicted felons, they would surely be deemed cruel and unusual. See *Gregg v. Georgia*, — U.S. —, 44 U.S.L. WEEK 5230, 5234-35 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). It would be incongruous if they were to be found otherwise when inflicted on young public school students.

In short, the record establishes violations of 42 U.S.C. § 1983 based on official deprivation of the Eighth Amendment right of freedom from cruel and unusual punishment. Dismissing the claims for these violations was error.

## II. THE FOURTEENTH AMENDMENT BARS CORPORAL PUNISHMENT WITHOUT DUE PROCESS.

The Fourteenth Amendment prohibits states from depriving any person of life, liberty or property without due process of law. This Court has held that public school students have a property interest in attending school and a liberty interest in maintaining their reputations and integrity, and that (except where deprivations are *de minimis*) states may not deprive students of such liberty or property rights on charges of misconduct, without according the students at least minimal due process. *Goss v. Lopez*, 419 U.S. 565, 572-76 (1975).

cases); *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947) (fine for civil contempt).

<sup>5</sup> The majority opinion describes these punishments as "paddling" or "spanking" on the "backside" or the "wrist"; it describes their consequences in terms of "discomfort" (525 F.2d at 911). These euphemisms and understatements cannot obscure the bodily violence visited on young Ingraham, Andrews, Lee, Bloom, Jones, Williams, Miss Dean and many others.

The corporal punishments meted out in this case deprived students of substantial liberty and property rights. Administrators and teachers at Drew Junior High School imposed such punishments arbitrarily, in disregard of the Due Process Clause, with no hearing or procedural safeguard of any kind.

### A. Drew Students Were Deprived of Substantial Property Rights.

As in *Goss* (which involved Ohio statutes and regulations), Florida statutes and School Board regulations provide for free compulsory education and empower school authorities to impose penalties for student misconduct (Florida Statutes §§ 232.01, 232.27; School Board Policy 5144).

In *Goss*, students were suspended for up to 10 days without a hearing. This Court held (419 U.S. at 574):

The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that clause.

Here students were kept out of school not by suspensions, but by beatings that disabled them from attending school, in some cases for as long as 10 days or two weeks. Thus they suffered the same property losses as those recognized in *Goss*. Indeed their property losses were greater; the beatings forced them not only to miss school but to incur medical and hospital expenses besides. The command of the Fourteenth

Amendment applied in *Goss* applies *a fortiori* in this case.

**B. Drew Students Were Deprived of Substantial Liberty Rights.**

The Fourteenth Amendment forbids arbitrary deprivations of liberty. Liberty encompasses not only freedom from arbitrary arrest or imprisonment, but also the right to maintain one's good name, reputation and integrity. When a state places these rights at stake, it must provide at least minimal due process. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971).

In *Goss*, where students were suspended without hearings on charges of misconduct, this Court held (419 U.S. at 575):

If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. It is apparent that the claimed right of the State to determine unilaterally and without process whether that misconduct has occurred immediately collides with the requirements of the Constitution. (Footnote omitted.)

Dade County School Board Policy 5144, as revised in 1971, requires that the offense for which a student receives corporal punishment be recorded. The recorded offense could, as in *Goss*, mar a student's reputation and future. But primarily and acutely at stake here is the student's bodily integrity. Freedom from bodily restraint is a fundamental liberty. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Freedom from bodily beatings cannot be deemed less fundamental. *Baker v. Owen*, 395 F. Supp. 294, 301 (M.D.N.C.)

(three-judge court), *aff'd*, — U.S. —, 96 S. Ct. 210 (1975).

Drew Junior High School administrators punished students for misconduct without providing means for testing the students' guilt or listening to circumstances in mitigation. As in *Goss*, they determined guilt and punishment "unilaterally and without process."

Corporal punishment holds extraordinary potential for abuse, as this record abundantly demonstrates and as courts have frequently noted, *e.g.*, *Nelson v. Heyne*, 491 F.2d 352, 356 (7th Cir. 1974); *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968). It is precisely for this reason that NEA advocates fair disciplinary procedures, not only when corporal punishment is severe and excessive but whenever corporal punishment is to be administered.

In NEA's view, liberty and due process should be woven into the very fabric of education, lest we "teach youth to discount important principles of our government as mere platitudes." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943). A student taught arbitrary corporal punishment by example may well fail to understand liberty taught by the book.

**III. DUE PROCESS REQUIRES NOTICE AND HEARING.**

In *Goss v. Lopez, supra*, this Court held that students punishable by suspension must be accorded at least "some kind of notice and . . . some kind of hearing." 419 U.S. at 579 (emphasis in original). No lesser process should be accorded students subject to corporal punishment.



In prescribing appropriate measures of due process, this Court seeks an "accommodation of the competing interests involved." *Ibid.*; *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 896 (1961). NEA believes that the procedures formulated in *Goss* reasonably accommodate the student's interest in freedom from arbitrary corporal punishment and the school official's interest in maintaining proper discipline.

The essence of due process was succinctly enunciated by Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 (1951):

Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. . . . Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.

*Notice of Charges.* This Court held in *Goss* that a student facing temporary suspension must "first be told what he is accused of doing and what the basis of the accusation is." 419 U.S. at 582. The notice need not be a formal written charge; it may be informal and oral. But some such notice is indispensable under the Due Process Clause. No less notice should be accorded to a student who is subject to corporal punishment.

*Opportunity for Hearing.* Disciplinary proceedings in public schools can hardly be expected to conform to the fact-finding procedures of a judicial trial, but

a rudimentary hearing may expose false or exaggerated charges, bring to light mitigating circumstances, avert arbitrary or excessive punishment. In *Goss*, this Court recognized that due process in public school discipline requires at least an informal hearing (419 U.S. at 584):

Requiring that there be at least an informal give-and-take between student and disciplinarian . . . will add little to the factfinding function where the disciplinarian has himself witnessed the conduct forming the basis for the charge. But things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.

Such a hearing is especially important in corporal punishment cases, where there is high potential for abuse and no way to undo a mistake.\*

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\* Punishment by suspension, if found to be unwarranted, can be swiftly remedied; the suspension can be lifted; the record of the student's alleged infraction can be expunged.

**CONCLUSION**

The judgment of the Fifth Circuit should be reversed and the case remanded for further proceedings consistent with the applicability of the Eighth and Fourteenth Amendments to corporal punishment in public schools.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1975

No. 75-6527

JAMES INGRAHAM, by his mother and next friend,  
ELOISE INGRAHAM, and ROOSEVELT ANDREWS, by  
his father and next friend, WILLIE EVERETT,  
*Petitioners,*

v.

WILLIE J. WRIGHT, I; LEMMIE DELIFORD; SOLOMON  
BARNES; EDWARD L. WHIGHAM; and THE DADE  
COUNTY SCHOOL BOARD, *Respondents.*

Certiorari to the United States Court of Appeals  
for the Fifth Circuit

Brief of the American Psychological Association Task  
Force on the Rights of Children and Youth as  
Amicus Curiae in Support of Petitioners

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**CONSENT TO FILING**

This amicus brief is filed pursuant to Supreme Court  
Rule 42(2), with the written consent of all parties to  
the case.



### INTEREST OF AMICUS CURIAE

"The American Psychological Association opposes the use of corporal punishment in schools, juvenile facilities, child care nurseries, and all other institutions, public or private, where children are cared for or educated."

### STATEMENT

We respectfully submit this brief based on the following resolution passed by the Council of Representatives—the governing body of the American Psychological Association.

The right of protection afforded to every human being against physical encroachment on their bodies without their consent is one of the most important protections afforded by the Constitution.

The wisdom of the Supreme Court to cautiously consider any decision permitting violence is well evidenced by its overruling mandatory enforcement of capital punishment—and specifically permitting this Writ of Certiorari—opposing corporal punishment in schools.

It is clear that the Constitutional issue of "cruel and unusual punishment" must be periodically reconsidered as it applies to any form of officially sanctioned physical violence.

It is especially relevant since the public school is the *only* institution which permits corporal punishment. For example, the armed forces, the prisons, and state hospitals, et al., specifically forbid corporal punishment.

### Is Corporal Punishment Unusual?

Historically, many western cultures have used spanking, caning, paddling, whipping, and flogging as methods of "beating the devil" out of errant children. Most societies do not currently believe that devils inhabit the bodies of young children.

However this particular form of punishment continues although the original meaning has lost validity.

In fact, in the civilized world many countries have long since abandoned corporal punishment in schools. Among them are Poland, Luxembourg, Holland, Austria, France, Finland, Sweden, Denmark, Belgium, Cyprus, Japan, Ecuador, Iceland, Italy, Jordan, Qatar, Mauritius, Norway, Israel, The Phillipines, Portugal, and all Communist block countries.

New Jersey, Massachusetts, and Maryland have state laws prohibiting corporal punishment in the schools, as have many cities including the District of Columbia, Chicago, Baltimore, New York, and Philadelphia.

It is therefore evident from a numerical point of view that corporal punishment is increasingly considered "unusual" as a practice to facilitate learning and improve behavior.

If a method of learning is effective it should be continued as a usual practice.

If it is not effective it should be discontinued and therefore is unusual.

Misbehavior in an educational setting, generally refers to behavior which impedes learning. However, educational and psychological research indicate that the use of corporal punishment and any punitiveness has a deleterious effect on learning.

The practice of corporal punishment provides a sanction for the use of violence as a solution to learning and behavior problems. Violence teaches counter-violence which encourages open hostility by children against schools.

A recent study conducted in Portland, Oregon, has shown that as corporal punishment increases in a particular school there is an increase in student vandalism against the school (Maurer, 1976).

Where corporal punishment has been sustained and encouraged as an aid to the learning process, it has been found ineffective. In fact, there is substantial evidence from the research in positive reinforcement, that children learn much more effectively in the absence of corporal punishment.

Therefore it is clear that if a method is shown to work it should become the "usual" method. It would be "unusual" for educators, faced with scientific data and the opinion of experts, to endorse a practice which is ineffective as being the "usual" method of pedagogy.

The United States Supreme Court, in *Baker v. Owen*, stated that "corporal punishment of children is today discouraged by the *weight* of professional opinion" (Holtzman, 1976).

The National Education Association Report on the Task Force on Corporal Punishment (1972) took a strong stand against the practice and offered many viable alternatives for motivating children to learn.

Despite the weight of professional opinion, some behavioral scientists maintain that there is not sufficient evidence to demonstrate the specific negative

effects of corporal punishment. There never will be the type of controlled research that some require for scientific proof. Our laws, ethics, and morals forbid the practice of using human "guinea pigs."

From animal research we know that avoidance behavior is the first response to pain. If escape is impossible, the organism will attack anything available—an otherwise peaceable cagemate, a tennis ball, the cage or even itself (Azrin & Holtz). Translated into human terms we find the child will first try to escape, by lying, by accusing others, by wriggling or by truancy, daydreaming or school phobia. If escape is impossible, he becomes aggressive and fights with his "cagemates." Biting and scratching at the cage is certainly vandalism and this too we find resulting from excessive punishment.

Lastly, when no other recourse is left the animal bites himself. We also see in some extreme cases child suicidal behavior, usually described as "self destructive."

#### Why Is Corporal Punishment "Cruel"?

It is cruel because it is inflicted most often upon children who are struggling with a variety of developmental and social problems which are related to their self image. The American Psychological Association has indicated in an official statement that "punishment intended to influence 'undesirable' responses often creates in the child the impression that he or she is an 'undesirable' person; and an impression that lowers self-esteem and may have chronic consequences."

It is "cruel" because it hurts. This is a fact recognized by all criminal statutes in evaluating assaults as crimes, differing only in degrees.



Most important there is never assurance that the teacher or administrator conducting the punishment can always control his or her own feelings to properly separate them from the "degree" of pain involved as solely related to the "offense." As in the case of *Ingraham v. Wright* over-zealous "punishers" can cause such physical damage that children may become severely injured and require hospitalization.

Does the United States Supreme Court feel that it can truly draw the line necessary for the welfare of children whom it has always protected?

#### CONCLUSION

In conclusion, the American Psychological Association's Task Force on the Rights of Children and Youth implores the United States Supreme Court to follow its wisdom of reversing its own decisions when their results have been proven ineffective.

Specifically, we request its reconsideration in reversing its former decisions permitting corporal punishment in schools.

We feel that this practice is ineffective as well as cruel and unusual and is disadvantageous to all the parties concerned.

Respectfully submitted,

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*Respondents.*

**BRIEF OF  
NATIONAL SCHOOL BOARDS  
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**No. 75-6527**

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**JAMES INGRAHAM**, by his mother and next friend, **ELOISE INGRAHAM**, and **ROOSEVELT ANDREWS**, by his father and next friend, **WILLIE EVERETT**,

*Petitioners,*

**vs.**

**WILLIE J. WRIGHT, I; LEMMIE DELIFORD; SOLOMON BARNES; EDWARD L. WHIGHAM; and THE DADE COUNTY SCHOOL BOARD,**

*Respondents.*

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**BRIEF OF  
NATIONAL SCHOOL BOARDS  
ASSOCIATION AS AMICUS CURIAE**

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**INTEREST OF THE AMICUS CURIAE**

Amicus curiae, National School Boards Association, is a nonprofit federation of this nation's state public school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. It is organized to promote the general advancement of education, to encourage the most efficient and effec-

tive organization and administration of the public schools, and to preserve the unique American tradition of lay control, with education policy decisions rendered by those directly accountable to the public through the elective or appointive process. In its thirty-sixth year, National School Boards Association is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

The individuals who make up this nation's school boards are predominantly lay elected or appointed community representatives, responsible under state law for the fiscal management, staffing, continuity and educational productivity of the public schools within their jurisdictions.

National School Boards Association submits this brief in the belief that the *en banc* decision of the United States Court of Appeals for the Fifth Circuit should be affirmed because it properly construes the Eighth and the Fourteenth Amendments, as they apply to the practice of corporal punishment in the public schools. Amicus further believes that the decision of the Court of Appeals should be affirmed because it insures the ability of the nation's school boards to govern effectively the schools entrusted to their care by the local communities to whom they are responsible. The concept of local lay control of public schools also requires that the decision of the Court of Appeals be affirmed.

The parties have, pursuant to Rule 42.2, consented to the filing of this brief.

## ISSUES PRESENTED FOR REVIEW

1. Whether the cruel and unusual punishments clause of the Eighth Amendment is applicable to the administration of discipline through severe corporal punishment imposed by public school teachers and administrators upon public school children.

2. Whether the due process clause of the Fourteenth Amendment requires that the imposition of severe corporal punishment by public school teachers and administrators be preceded by notice to the student of the charges against him and an opportunity for him to be heard.

## STATEMENT OF THE CASE

Amicus curiae relies on the statement of the case set forth in the brief for respondents.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the United States Constitution:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment to the United States Constitution (in pertinent part):

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 1983 of Title 42 of the United States Code:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or



Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

### SUMMARY OF ARGUMENT

The Court of Appeals for the Fifth Circuit properly held that the Eighth Amendment's prohibition of cruel and unusual punishments is a prohibition limited to punishments that are imposed in the criminal law context. The language, history, and past applications of the Eighth Amendment demonstrate that the Court of Appeals correctly found that disciplinary actions by school personnel fall outside the scope of the Eighth Amendment. Even if the Eighth Amendment were found to apply to school discipline, however, it is clear that severe corporal punishment imposed by school officials is not a cruel or unusual punishment within the meaning of the Eighth Amendment because it is a traditional form of punishment that is widely approved by educators and laymen and does not offend basic human dignity.

The Court of Appeals also correctly held that the due process clause of the Fourteenth Amendment does not require that notice and a hearing be afforded to a student prior to the imposition of corporal punishment in the school discipline context. The Court of Appeals found that no liberty or property interest sufficient to trigger application of the Fourteenth Amendment was implicated by the facts of this case. In an attempt to discredit the reasoning of the Court of Appeals, plaintiffs now argue that the Fourth Amendment creates a right to be free from unjustified physical assaults and that this Fourth Amendment right

constitutes a liberty interest worthy of Fourteenth Amendment protection. This novel theory was not urged on the Court of Appeals. Moreover, the traditional protections embodied in the Fourth Amendment have never been considered by this Court as liberty interests within the meaning of the due process clause. A right to notice and an adversary hearing is an anomaly in the Fourth Amendment context. Even assuming, however, that the Fourth and Fourteenth Amendments would require that an adult be given notice and an opportunity to be heard in some circumstances, it does not follow that a school child should be afforded such protections in a routine disciplinary proceeding in the public schools. The constitutional rights of school children are necessarily limited by the exigencies of the educational process.

This Court has frequently recognized that our federal system places the responsibility for operation of the nation's schools in the hands of local school boards elected or appointed by the local communities to whom they are responsible. This Court has recognized that effective local lay control of the public schools requires that the federal courts should not interfere in the operation of the schools unless basic constitutional rights are directly and sharply implicated. No basic constitutional rights are implicated in this case. Moreover, if school boards should have to devote their limited resources to providing procedural safeguards in thousands of cases of sub-suspension disciplinary action, their ability to meet their responsibility for providing an adequate education for the school children of their communities would be seriously jeopardized.

For these reasons, the decision of the Court of Appeals should be affirmed.

## ARGUMENT

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### Introduction

This case presents a question of acute importance to the continued viability of local lay control of the public schools: whether local school boards are free to determine and enforce appropriate methods of sub-suspension student discipline. Plaintiffs contend that severe corporal punishment, as a method of public school discipline, violates the Eighth Amendment or, alternatively, that the Fourteenth Amendment requires that notice and hearing be afforded to students prior to the imposition of severe corporal discipline, which they define as including "one 'lick' with a paddle." *Petitioners' Brief*, 44 n.19.

The Court of Appeals for the Fifth Circuit, sitting *en banc*, correctly held that severe corporal punishment as a method of school discipline does not violate the Eighth Amendment because the cruel and unusual punishments clause is limited in its application to punishments that are imposed in a criminal law context. *Ingraham v. Wright*, 525 F.2d 909, 914 (5th Cir. 1976) (*en banc*). Amicus will demonstrate that the Fifth Circuit's disposition of this issue is consistent with the language, purpose, and history of the Eighth Amendment as previously construed by this Court. Thereafter, amicus will show that severe corporal punishment is not cruel or unusual even if the Eighth Amendment is applicable to public school disciplinary activities.

The Court of Appeals for the Fifth Circuit held that the Fourteenth Amendment did not require that school children be afforded notice and an opportunity to be heard

prior to the imposition of severe corporal punishment. In order to determine whether due process requirements are applicable, this Court must first determine whether any liberty or property interest is at stake. Amicus will demonstrate that no such interest is implicated in this case. Even if such an interest were implicated here, it would necessarily be limited by the fact that the plaintiffs are school children, whose constitutional rights must be balanced against the legitimate needs of the educational process.

In Dade County, as elsewhere, corporal punishment is employed as a disciplinary tool in cases of misbehavior which merit punishment less than expulsion or suspension from school. Corporal punishment is one of a number of lesser order disciplinary remedies available to professional educators. While educators and laymen may differ as to the wisdom of corporal punishment, that question is not before this Court, which must consider only whether corporal punishment violates the Constitution. Amicus believes that severe corporal punishment does not run afoul of the Eighth Amendment and that it does not constitute a denial of liberty or property sufficient to trigger due process. Moreover, as a practical matter, amicus believes that a constitutional requirement of notice and hearing in cases of minor disciplinary action would be so burdensome a restriction on discipline in the public schools as to be unworkable. In purely economic terms, the public schools could not afford such procedures. As an educational matter, the significant diversion of resources, particularly instructional and administrative time, necessary to comply with the mandate of such procedures would be disastrous to the quality of public education in this nation. Amicus believes that both the Constitution and sound public policy require that disciplinary measures less than suspension be left in the hands of professional educators and the politically responsible local school boards to whom they report.



## I.

**SEVERE CORPORAL PUNISHMENT ADMINISTERED BY PUBLIC SCHOOL OFFICIALS DOES NOT VIOLATE THE EIGHTH AMENDMENT.**

**A. Corporal Discipline Administered By Public School Officials Is Not "Punishment" Within The Meaning Of The Eighth Amendment.**

The Eighth Amendment provides that, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. In terms, the Eighth Amendment states three specific constitutional limitations on the power of the government to administer the processes of the criminal law. The framers of the Bill of Rights thought it desirable to provide the people with an explicit constitutional protection against excessive fines, bails, and punishments. Informed by the long experience of English history, the framers understood that unwarranted invasions of liberty might be accomplished through perversions of the criminal process. Their reliance on English constitutional history is demonstrated by their adoption of the exact language of the English Bill of Rights of 1689. See Granucci, "*Nor Cruel and Unusual Punishments Inflicted:*" *The Original Meaning*, 57 Calif.L.Rev. 839, 840-41 (1969).

Taken together, the three prohibitions of the Eighth Amendment indicate a symmetry of purpose: an unequivocal intention to limit the government's exercise of its criminal law function. Plaintiffs would have this Court ignore the textual consistency of the Eighth Amendment, with its emphasis on the criminal law, and encompass corporal discipline of school children within the scope of

the cruel and unusual punishments clause. While the concepts of fines and bails would, presumably, continue to be limited to the criminal context, the concept of punishment would be exalted to a preferred position which would encompass a multitude of punishments beyond the realm of the criminal law. The implications of such an expansion of the Eighth Amendment would be both novel and far-reaching. Once the concept of punishment is extended beyond the context of the criminal law, it is difficult to predict where its limits could safely be fixed. Given the almost unlimited range of governmental decisions which may, in some sense, have an adverse or punitive effect on citizens, plaintiffs' definition of punishment would necessarily result in application of the Eighth Amendment in a nearly unlimited variety of circumstances.

Plaintiffs' construction of "punishment" to include public school disciplinary measures is extravagant. It is both unfaithful to the language and history of the Eighth Amendment and inconsistent with the previous decisions of this Court. Plaintiffs' argument demonstrates what Mr. Justice Cardozo called "[t]he tendency of a principle to expand itself to the limit of its logic," a tendency which must be counteracted by an effort to confine the principle within the limits of its history. B. Cardozo, *THE NATURE OF THE JUDICIAL PROCESS* 51 (1921). Plaintiffs' expansion of the Eighth Amendment to encompass public school disciplinary measures, by wrenching "punishment" from its proper context, is inconsistent with the Amendment's purpose and history. Properly understood, "punishment" is a word of art in the Eighth Amendment; its scope is necessarily limited to those penalties which result from criminal prosecution.

In *Furman v. Georgia*, 408 U.S. 238, 316-22 (1972), Mr. Justice Marshall exhaustively discussed the history of the Eighth Amendment. After surveying the state of historical knowledge concerning the development of the cruel and unusual punishments clause, he concluded that:

Whether the English Bill of Rights prohibition against cruel and unusual punishments is properly read as a response to excessive or illegal punishments, as a reaction to barbaric and objectionable modes of punishment, or as both, there is no doubt whatever that in borrowing the language and in including it in the Eighth Amendment, our Founding Fathers intended to outlaw torture and other cruel punishments. *Id.*, 319 (concurring opinion) (footnote omitted).

This Court has previously held, of course, that punishments need not be barbarous in themselves to run afoul of the Eighth Amendment. A punishment may be cruel and unusual if it lacks proportionality to the criminal offense for which it is imposed. *Weems v. United States*, 217 U.S. 349 (1910). Likewise, a punishment may be cruel and unusual if it is imposed in the absence of conduct that may properly be characterized as criminal. In *Robinson v. California*, 370 U.S. 660 (1962), the Court held invalid a California statute which provided a ninety day sentence for the "offense" of narcotic addiction. The Court noted that a ninety day sentence was not, in itself, a cruel or unusual punishment. Nonetheless, the Court concluded that any sentence was cruel and unusual punishment in the absence of a criminal offense. "Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." *Id.*, 667.

Application of the Eighth Amendment is not limited to those criminal punishments which might have been considered cruel or unusual in 1789. This Court has consis-

tently said that "a principle to be vital must be capable of wider application than the mischief which gave it birth." *Weems, supra* at 373. Consequently, the cruel and unusual punishments clause "is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.*, 378. The language of the Eighth Amendment, construed in light of developing standards of humane justice, may now be thought to encompass a wider range of criminal punishments than at the time of its adoption. It must be emphasized, nonetheless, that the Court's broadening of the class of criminal punishments included within its definition of cruel and unusual has not been accompanied by any concomitant broadening of the definition of punishment to extend that concept beyond the limits of the criminal law. In this respect, the Court has meticulously followed the language and purpose of the Eighth Amendment.

In *Powell v. Texas*, 392 U.S. 514, 531-32 (1968), the Court said that, "The primary purpose of . . . [the cruel and unusual punishments] clause has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes." Although many types of civil proceedings may have a serious punitive effect on persons subject to governmental power, such punitive effects have always been considered beyond the scope of the Eighth Amendment. The Court has held, for instance, that the cruel and unusual punishments clause is inapplicable to judicial review of deportation proceedings. In *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893), the Court held that:

The order of deportation is not a punishment for crime. . . . [T]herefore . . . the provisions of the Constitution, securing the right of trial by jury, and pro-



hibiting unreasonable searches and seizures, and cruel and unusual punishments have no application.

This Court made a similar analysis of the civil contempt sanction in *Uphaus v. Wyman*, 360 U.S. 72 (1959). In *Uphaus*, the New Hampshire legislature had authorized the state Attorney General to investigate violations of the state's Subversive Activities Act and determine whether "subversive persons" were within the state. Uphaus, the executive director of a state-chartered corporation which was a target of investigation, refused to comply with a subpoena to produce documents relating to the activities of the corporation. The subpoena was enforced by the New Hampshire courts and Uphaus was held in contempt. The judgment of contempt ordered Uphaus to be confined until such time as he would produce the documents described in the subpoena. In this Court, Uphaus attacked the contempt on various constitutional grounds, including the Eighth Amendment. The Court found that the Attorney General's demand for the documents was valid and that the judgment of contempt for refusal to produce them was also valid. The Court further emphasized that contempt "is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees." *Id.*, 81 [quoting *Green v. United States*, 356 U.S. 165, 197 (1958) (dissenting opinion)]. The Court was unmoved by the fact that civil contempt results in incarceration, because civil contempt is not a criminal punishment within the meaning of the Eighth Amendment. While civil contempt may seriously affect the liberty of the contemner, incarceration in this context does not constitute criminal punishment.

In *Donaldson v. Read Magazine*, 333 U.S. 178 (1948), the Postmaster General entered an order which prevented a magazine publisher from receiving mail and cashing postal money orders because the Postmaster General believed, on the basis of evidence "satisfactory to him," that the publisher was using the mails to defraud. The publisher argued that this civil order would destroy his business and that it was cruel and unusual punishment. The Court rejected the publisher's argument:

Its [the order's] effect is merely to enjoin the continuation of conduct found fraudulent. Carried no further than this, the order has not even a slight resemblance to punishment—it only keeps respondents from getting the money of others by false pretenses and deprives them of a right to speak or print only to the extent necessary to protect others from their fraudulent artifices. And so far as the impounding order is concerned, of course respondents can have no just or legal claim to money mailed to them as a result of their fraudulent practices.

*Id.*, 191-92.

The effect of the Postmaster General's order was clearly punitive in the sense that it adversely affected the publisher's ability to conduct his business. It was not, however, any part of a criminal prosecution and thus did not constitute punishment within the meaning of the Eighth Amendment.

The lower federal courts have adhered to the analysis set forth in *Fong Yue Ting* and *Uphaus*. In *Santelises v. Immigration and Naturalization Service*, 491 F.2d 1254 (2d Cir. 1974), *cert. denied*, 417 U.S. 968 (1974), the Second Circuit denied review of a deportation order which the alien had challenged as a cruel and unusual punishment.

The court rejected the petitioner's Eighth Amendment argument "out of hand," stating that, "It is settled that deportation, being a civil procedure, is not punishment and the cruel and unusual punishment clause of the Eighth Amendment accordingly is not applicable." *Id.*, 1255-56. In *Oliver v. United States Department of Justice*, 517 F.2d 426 (2d Cir. 1975), *cert. denied*, ..... U.S. ...., 96 S.Ct. 789 (1976), another deportation case, the Second Circuit rejected a similar argument. The court in *Oliver* was not unmindful of the "severe consequences" which follow from a deportation order, but held that deportation is a civil proceeding and its consequences do not amount to punishment in any constitutional sense. *Accord, Chabolla-Delgado v. Immigration and Naturalization Service*, 384 F.2d 360 (9th Cir. 1967), *cert. denied*, 393 U.S. 865 (1968).

In *Roberts v. Knowlton*, 377 F. Supp. 1381 (S.D.N.Y. 1974), a cadet who had been discharged from the United States Military Academy, because he had violated the Academy's honor code, alleged that his discharge violated the cruel and unusual punishments clause. The court was unpersuaded by the cadet's argument, noting that he did not even incur an obligation to enter active military duty, and that the sum total of his "punishment" was that he would have to go elsewhere to complete his college education. "[T]he 'cruel and unusual' argument is rejected by this Court as plainly inapplicable, in the non-criminal context of this case." *Id.*, 1385. Similarly, in *Press v. Pasadena Independent School District*, 326 F.Supp. 550 (S.D. Tex. 1971), a school child who was suspended for violations of her school's dress code alleged that the suspension violated the Eighth Amendment. The court held that a suspension from school was not a punishment within the meaning of the Eighth Amendment which, the court said, was directed to criminal sanctions. Finally, in *Zwick v.*

*Freeman*, 373 F.2d 110 (2d Cir. 1967), a commodities trader who was barred from trading because of his repeated violations of the Perishable Commodities Act, alleged that this punishment was cruel and unusual. The court disagreed on the ground that the penalty was purely civil in nature and, thus, it was not a punishment within the meaning of the Eighth Amendment.

Plaintiffs in this case rely on the Court's decision in *Trop v. Dulles*, 356 U.S. 86 (1958), to demonstrate that the cruel and unusual punishments clause is not limited in its application to criminal punishments. That reliance is clearly misplaced. In *Trop*, a native-born citizen who had not, in any way, voluntarily abandoned his citizenship, challenged Section 401(g) of the Nationality Act of 1940, which provided that a citizen shall lose his nationality by "[d]eserting the military or naval forces . . . in time of war, provided he is convicted thereof by court martial and as a result of such conviction is dismissed or dishonorably discharged from the service." The Court held that this section of the statute was unconstitutional because it violated the Eighth Amendment. Plaintiffs here emphasize the factual posture of *Trop*: that Trop applied for a passport, which was denied to him by "civil authorities." Although Trop's ineligibility to secure a passport resulted from his dishonorable discharge, which in turn followed from his court-martial conviction for desertion, plaintiffs argue that the punishment Trop suffered was a "civil" punishment because the final blow was struck by civil authorities. On this ground, plaintiffs argue that *Trop* expanded the scope of the Eighth Amendment's prohibition of cruel and unusual punishments to include civil as well as criminal penalties.



Clearly, the Court in *Trop* did not construe the facts or the law in this way. The punishment which was inflicted on Trop did not consist of a passport denial; the true punishment was the deprivation of his citizenship, from which the passport denial necessarily followed. Moreover, this deprivation of citizenship was a direct result of his court-martial and dishonorable discharge. In any real sense, the punishment he suffered was an additional punishment inflicted for the crime of desertion. The Court recognized this fact in the first sentence of its opinion: "The petitioner in this case, a native-born American, is declared to have lost his United States citizenship by reason of his conviction by court-martial for wartime desertion." *Id.*, 87. Mr. Justice Brennan, concurring in the judgment, noted "that the Congress has confirmed the correctness of the view that it purposed expatriation of the deserter solely as additional punishment." *Id.*, 109. The importance of this factor is underscored by the Court's opinion in *Perez v. Brownell*, 356 U.S. 44 (1958), which was decided on the same day as *Trop*. Like Trop, Perez had lost his citizenship pursuant to the Nationality Act of 1940. In Perez's case, however, the loss of citizenship resulted from his having voted in a foreign election, an act which was not itself a criminal offense. The Court upheld the right of Congress to deprive a citizen of his citizenship for having participated in a foreign election because that deprivation was not a criminal punishment and it was within the foreign affairs power of the Congress. In *Trop*, the Court explicitly distinguished *Perez*, by noting that the section of the Nationality Act applicable to Trop, unlike that applicable to Perez, was a "penal law," and "we must face the question whether the Constitution permits the Congress to take away citizenship as

a punishment for crime." *Trop, supra* at 99 (emphasis added). In *Perez*, the Court had held that Congress could divest a citizen of his citizenship for purposes unrelated to punishment. In *Trop*, the Court said that, "If it is assumed that the power of Congress extends to divestment of citizenship, the problem still remains as to this statute [the desertion section] whether denationalization is a cruel and unusual punishment within the meaning of the Eighth Amendment." *Id.* The Court held that denationalization, as punishment for the criminal offense of desertion, was cruel and unusual.

Plaintiffs suggest that the Court's characterization of the statute in *Trop* as a "penal law" expands the definition of punishment, for Eighth Amendment purposes, beyond the criminal law context. In light of the distinction that the Court made between the cases of *Perez* and *Trop*, this argument is unpersuasive. Moreover, the Court's discussion of penal laws in *Trop* was necessitated only by the Secretary of State's contention that denationalization could never constitute punishment within the meaning of the Eighth Amendment because the Cabinet Committee which drafted the Nationality Act of 1940 had concluded that the law was not "technically" a penal law. *Id.*, 94. In effect, the Court merely asserted that its duty to expound the meaning of the Constitution could not be superseded by the legal conclusions of administrative officials. Whether a disability runs afoul of the Eighth Amendment is a judgment which must be made by the Court, not by the Congress or by administrative officials who draft legislation that is enacted by the Congress. In spite of the representations made by the draftsmen, the Court properly found that denationalization, in these circumstances, constituted an additional punishment levied for

the crime of desertion and that this punishment was cruel and unusual. When viewed in conjunction with the Court's holding in *Perez*, it is clear that *Trop* demonstrates no expansion of the Eighth Amendment's concept of punishment to include punishments or disabilities that do not flow from a criminal prosecution. In *Trop*, denationalization was clearly a punishment which resulted from a conviction for desertion and a dishonorable discharge from the Armed Forces.

In *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968), the court held "that the use of the strap in the penitentiaries of Arkansas is punishment which, in this last third of the 20th century, runs afoul of the Eighth Amendment." Plaintiffs take comfort in *Jackson* and argue that the holding in that case should be extended to prohibit the paddling of school children. In *Jackson*, of course, the question did not arise whether the strap was a punishment for Eighth Amendment purposes because the plaintiffs in that case were prisoners, a class whose protection fell squarely within the central purpose of the Eighth Amendment. The very purpose of the Amendment was to prohibit the infliction of cruel and unusual punishments as retribution for criminal offenses. It would be futile to argue that corporal punishment in the prison situation did not constitute punishment for purposes of the Eighth Amendment. Consequently, the only question before the court was whether the punishment was cruel and unusual.

Plaintiffs contend that the Eighth Amendment must prohibit corporal punishment in schools because it prohibits at least some forms of corporal punishment in prison, and school children should not be entitled to less protection than convicted felons. This argument is appealing on an emotional level. Nonetheless, it begs the constitutional

question: whether corporal punishment in schools is punishment within the meaning of the Eighth Amendment. Amicus believes that the history and development of the Eighth Amendment demonstrate that persons subject to the processes of the criminal law are the only persons who constitute a protected class within the meaning of the Amendment. For this reason, plaintiffs' analogy fails. It is not unreasonable for the Constitution to permit corporal punishment of school children, but not hardened criminals, if the Eighth Amendment exclusively concerns limitations on criminal punishments. The Court of Appeals for the Fifth Circuit properly disposed of plaintiffs' argument:

We do not find prisons and public schools to be analogous in the context of Eighth Amendment coverage. As discussed, *supra*, the function of the Eighth Amendment's prohibition against cruel and unusual punishments was intended to prevent the imposition of unduly harsh penalties for criminal conduct. It is not an unreasonable interpretation of the Eighth Amendment to include within its coverage discipline imposed upon persons incarcerated for criminal conduct, since such discipline is part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny. To extend the *Jackson* case from a prison context to a public school situation would, however, distort the intended scope of the Amendment.

*Ingraham v. Wright*, 525 F.2d 909, 914-15 (5th Cir. 1976) (*en banc*) (footnote omitted).

Some lower federal courts have disagreed with the conclusion reached by the Fifth Circuit in *Ingraham*. In *Bramlet v. Wilson*, 495 F.2d 714 (8th Cir. 1974), the court held that corporal punishment of school children



might, in some circumstances, amount to cruel and unusual punishment. The persuasive authority of *Bramlet* is limited, however, because the court did not undertake any reasoned analysis as to whether corporal punishment in schools constituted punishment within the meaning of the Eighth Amendment. Plaintiffs' reliance on *Nelson v. Heyne*, 491 F.2d 352 (7th Cir. 1974), *cert. den.*, 417 U.S. 976 (1974), is equally unavailing. In *Nelson*, the Seventh Circuit held that severe corporal punishment of children incarcerated in a state institution for delinquents was barred by the Eighth Amendment. The institution in *Nelson* was a medium security state correctional institution for boys between the ages of twelve and eighteen years. While an estimated one-third of the residents were not criminal offenders, the court did not address the significance of the difference in status, for Eighth Amendment purposes, between those residents who were criminal offenders and those who were not. The Seventh Circuit relied on *Jackson* in holding that severe corporal punishment was barred by the Eighth Amendment. Significantly, the court noted that it did not hold "that all corporal punishment in juvenile institutions or reformatories is per se cruel and unusual." *Nelson*, *supra* at 355 n.6. Moreover, the defendants apparently did not suggest that a different principle should apply to non-criminal offenders within their control, and the court did not specifically consider whether *Jackson* should apply to persons who were not subject to criminal sanctions. That the court's attention was not directed to this fact can scarcely serve as precedent for the proposition that the cruel and unusual punishments clause extends beyond the area of criminal sanctions.

Other lower federal courts have concluded that school disciplinary actions do not constitute punishment with-

in the meaning of the Eighth Amendment. In *Gonyaw v. Gray*, 361 F. Supp. 366, 368 (D. Vt. 1973), the district court found that a state statute providing for corporal punishment in schools did not violate the Eighth Amendment "since this amendment provides a limitation against penalties imposed for criminal behavior." The court said that, "Since neither plaintiff was punished for an offense which was criminal in nature, the Eighth Amendment does not proscribe the conduct assigned to the defendants." *Id.* The Sixth Circuit has also held that the cruel and unusual punishments clause has no application in the school disciplinary context. *Sims v. Waln*, 536 F.2d 686 (6th Cir. 1976).

The language, purpose and history of the Eighth Amendment consistently demonstrate that school disciplinary procedures are beyond the scope of the cruel and unusual punishments clause. For this reason, the judgment of the Court of Appeals should be affirmed.

**B. Even If The Cruel And Unusual Punishments Clause Applies To School Disciplinary Proceedings, Severe Corporal Punishment Is Not Cruel And Unusual.**

As this Court recently noted, "the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts." *Gregg v. Georgia*, ..... U.S. ...., 96 S.Ct. 2909, 2925 (1976). A punishment selected by a democratically elected legislative body is entitled to a presumption of validity. "We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people." *Id.*, 2926.

In determining whether a particular punishment runs afoul of the Eighth Amendment, the Court must make two separate inquiries. First, the Court must "look to objective indicia that reflect the public attitude toward a given sanction." *Id.*, 2925. The Court must be guided by history and by public perceptions of standards of decency, such as those embodied in legislative enactments. Second, the Court must consider whether a particular punishment is excessive in a constitutional sense. *Id.* The Court must determine whether the punishment involves "unnecessary and wanton inflictions of pain"; it must also consider whether the punishment is "*grossly* out of proportion to the severity of the crime." *Id.* (emphasis added). If severe corporal punishment is punishment within the meaning of the Eighth Amendment, it must be considered in light of these tests.

### 1. The Historical Background And State Law Principles Of Corporal Punishment.

The entire history of American education demonstrates that school administrators and teachers have considered corporal punishment to be an acceptable and useful means of correcting student behavior and maintaining discipline in the classroom. During the colonial period, corporal punishment was regularly employed in the schools and colleges of the colonies. H. Falk, *CORPORAL PUNISHMENT: A SOCIAL INTERPRETATION OF ITS THEORY AND PRACTICE IN THE SCHOOLS OF THE UNITED STATES* 20 (1941). In 1789, when the Great and General Court of Massachusetts first enacted legislation enabling towns in the Commonwealth to establish independent public school districts, the principle of corporal punishment in the schools was well-established. N. Edwards & H. Richey, *THE SCHOOL IN THE AMERICAN SOCIAL ORDER* 110-12 (1947); S. Knezevich, *ADMINISTRATION*

*OF PUBLIC EDUCATION* 113-14 (2d ed. 1969). Throughout the nineteenth century, corporal punishment was regularly administered in the public schools. Horace Mann, the principal proponent of public education in the nineteenth century, believed that corporal punishment was a necessary element of public school discipline. *Falk, supra* at 66. The annual reports of the Boston School Committee also demonstrate the extent to which corporal punishment was employed in the public schools during that period. In the 1887-1888 school year, for instance, eighteen thousand instances of corporal punishment were reported in the Boston schools. *Id.*, 96. A 1941 empirical study demonstrates that public and professional attitudes toward corporal punishment had not changed significantly at that time: "The results of our investigation indicate that in a large proportion of schools, corporal punishment is still resorted to as a means of discipline; that public opinion, administrators of school systems, and teachers of education are divided as to its desirability; and that there is a tendency to use corporal punishment under definite limits and as a last resort." *Id.*, 137.

In 1963, two writers on school discipline noted "a growing trend throughout the country to regard a return to its [corporal punishment's] use in our schools as a partial answer to the problems of delinquency." K. Larson & M. Karpas, *EFFECTIVE SECONDARY SCHOOL DISCIPLINE* 146 (1963). The same writers surveyed the state of research on corporal punishment and concluded that, "Numerous studies indicate that a majority of superintendents are in favor of some form of corporal punishment." *Id.*, 149.

The legal history of corporal punishment in the schools parallels the history of educational practice. Several hundred years of common law development have resulted in



the recognition that corporal punishment is a valid form of school discipline which school personnel are legally privileged to employ, but that the degree of the punishment must be reasonable in the circumstances. *See, Note, Corporal Punishment in the Public Schools*, 6 Harv. Civ. Rights—Civ. Lib. L. Rev. 583, 583-84 (1971). As one commentator has suggested, this rule is based on the understanding that "once they are physically present, something must be done to protect students from each other and to maintain the integrity of the educational process." Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U.Pa.L.Rev. 545, 576 (1971). The inherent difficulty of this task requires that school personnel be given considerable discretion in determining the proper means for performing their ultimate duty to educate school children.

Moreover, this principle is consistent with generally recognized tort principles. In the absence of specific statutory limitations, "The social and moral duty of the parent, teacher or guardian to train the child, pupil or ward is of such character that it is commonly supposed that the welfare of both the child and of society require the privilege of enforcing reasonable discipline by physical chastisement." F. Harper & F. James, Jr., *LAW OF TORTS* §3.20, p. 290 (1956). Generally, a teacher is privileged to employ any reasonable punishment for the proper education of the child and the maintenance of group discipline. The punishment must not be excessive and it must be reasonable in the circumstances, but severe corporal punishment is not categorically prohibited. It may be reasonable in particular cases. Harper and James succinctly summarize the test: "All the circumstances of the case, of course, are to be taken into consideration in determining the reason-

ableness of the punishment, including the nature of the child's offense, . . . the sex, age and strength of the child, the type of instrument, if any, employed in the chastisement and the nature and extent of the harm inflicted." *Id.*, 290-91 (footnote omitted).

The RESTATEMENT OF TORTS also recognizes the privilege of teachers to employ reasonable corporal punishment in the discipline of school children. Section 147(2) provides that:

One other than a parent who has been given by law or has voluntarily assumed in whole or in part the function of controlling, training, or educating a child, is privileged to apply such reasonable force or to impose such reasonable confinement as he reasonably believes to be necessary for its proper control, training, or education, except in so far as the parent has restricted the privilege of one to whom he has entrusted the child.

RESTATEMENT (SECOND) OF TORTS §147(2) (1965).<sup>1</sup>

<sup>1</sup> Section 153(2) of the Restatement recognizes that the authority of a public school official to impose corporal punishment may not be limited by parental prohibition:

One who is in charge of the education or training of a child as a public officer is privileged to inflict such reasonable punishments as are necessary for the child's proper education or training, notwithstanding the parent's prohibitions or wishes.

RESTATEMENT (SECOND) OF TORTS, §153(2) (1965).

In *Baker v. Owen*, 395 F.Supp. 294 (M.D.N.C.), *aff'd* 423 U.S. 907 (1975), this Court held, as a matter of constitutional law, that parental objections could not bar the use of corporal punishment by public school officials. As the Court of Appeals noted, this Court's review of the issues raised in *Baker* was limited to the question of parental objection. The Court did not reach any other question considered by the district court. *See Ingraham v. Wright*, 525 F.2d 909, 918 (5th Cir. 1976) (*en banc*).

In Section 150, the draftsmen have set out the factors which must be considered in determining whether a particular punishment is reasonable. These factors include the nature of the child's offense, his apparent motive, the influence of his example upon other children, the proportionality of the punishment to the offense, and the likelihood that the punishment will cause serious or permanent harm. *Id.*, §150. The Restatement clearly authorizes the use of severe corporal punishment in circumstances where it is appropriate. The Reporter's Notes demonstrate the emphasis which the law places on the informed discretion of the disciplinarian:

Thus, a more severe punishment may be imposed for a serious offense, or an intentional one, than for a minor offense, or one resulting from a mere error of judgment or careless inattention. The fact that the child has shown a tendency toward certain types of misconduct may justify a punishment which would be clearly excessive if imposed upon a first offender. If one child in a family or group has shown himself to be a ringleader in misconduct, the necessity of correcting his mischievous tendencies in order that other children may not be influenced may justify a punishment more severe than would be permissible if there were no other children likely to be misled by his example. The age and sex of the child may also be important. A punishment which would not be too severe for a boy of twelve may be obviously excessive if imposed upon a child of four or five. Likewise, it may be excessive to punish a girl for a particular offense in a manner which would be permissible as a punishment for the same offense committed by a boy of the same age.

*Id.*, comment c, pp. 268-69.

The reasonableness test relies on the expertise, judgment, and good faith of professional educators and politi-

cally responsible laymen who are elected to "cope with the myriad day-to-day problems of a modern public school system" and who are "accountable to the voters for the manner in which they perform." *Hortonville Joint School District No. 1 v. Hortonville Education Association*, ..... U.S. ...., 96 S.Ct. 2308, 2316 (1976). The test itself is necessarily imprecise. It recognizes that the determination of an appropriate response to particular cases of student misbehavior is not subject to a mathematically precise formulation. As one commentator has emphasized, "the decision to discipline a student is not reached in the more detached atmosphere of a courtroom but rather exclusively by a layman in or near the harried climate of the public schools, with 'bells ringing, buzzers sounding, public address systems making all those announcements, thousands of noisy adolescents pushing and shoving their way through crowded halls and stairways, locker doors banging . . . and so on.'" Wilkinson, *Goss v. Lopez: The Supreme Court As School Superintendent*, 1975 Sup. Ct. Rev. 25, 43.

The reasonableness test is not, of course, without risks for public school personnel. The school official acts at his peril. A course of action which, in the heat of duty, seemed reasonable to the school principal may seem unreasonable to a judge or jury with the benefit of hindsight. It is difficult to draw a precise distinction between permissible and impermissible corporal punishment. N. Edwards, *THE COURTS AND THE PUBLIC SCHOOLS* 611 (3rd ed. 1971). While it may be imperfect, the reasonableness test represents a classic example of the common law's ability to justly accommodate conflicting interests.

The critical fact for analysis here is that the traditional principles of tort law, as applied in the circumstances of school discipline, do not preclude the use of severe corpo-



ral punishment when that type and degree of punishment is reasonable. The reasonableness test is relevant, of course, to plaintiffs' contention that severe corporal punishment is a *per se* violation of the Eighth Amendment. In *Gregg*, the Court stated that the first step in Eighth Amendment analysis is to "look to objective indicia that reflect the public attitude toward a given sanction." *Gregg*, *supra* at 2925. In this case, it is appropriate to consider the response of the states to the reasonableness test.

## 2. Contemporary Standards.

Significantly, plaintiffs note that only Massachusetts and New Jersey have seen fit to prohibit corporal punishment by statute in the public schools. *Petitioners' Brief*, 32 n.10. The statutes of thirteen states specifically permit corporal punishment. National Education Association, REPORT OF THE TASK FORCE ON CORPORAL PUNISHMENT 24-A (1972). Moreover, according to plaintiffs' own compilation, at least twenty-three states give teachers the same authority as a parent to discipline a child or authorize the teacher to maintain order and discipline in the classroom. *Petitioners' Brief*, 31-32. General tort law principles afford to parents the privilege of using reasonable force, including severe corporal punishment when reasonable, to discipline a child. See, RESTATEMENT (SECOND) OF TORTS §147(1). If a teacher is privileged to use the same degree of force as a parent, it necessarily follows that a teacher is privileged to use severe corporal punishment in situations where it would be reasonable to do so. Likewise, statutes which authorize a teacher to maintain order and discipline in the classroom must be construed, in light of applicable common law principles, to authorize the use of reasonable corporal punishment.

Plaintiffs summarize this statutory evidence as suggesting popular ambivalence toward *any* corporal punishment, and a total lack of acceptance of severe corporal punishment. It is difficult to see how plaintiffs reach this conclusion. In the absence of statute, the law provides that a teacher may use reasonable force to discipline students and maintain order in the classroom. Although teachers may not use *excessive* corporal punishment, they may use *severe* corporal punishment if it would be *reasonable* in the circumstances. The overwhelming majority of state statutes merely codify this common law principle. Clearly, this adherence to common law principles does not demonstrate a lack of public acceptance of severe but reasonable corporal punishment. The evidence demonstrates the opposite.

Empirical evidence also indicates continued public and professional acceptance of corporal punishment in the schools. In 1975, for instance, the Pennsylvania Board of Education commissioned a study of corporal punishment which surveyed parents, teachers, students, school boards and administrators concerning their impressions of the effectiveness of corporal punishment as a disciplinary sanction. Seventy-five per cent of all adults responding to the Pennsylvania questionnaire favored the availability of corporal punishment as a method of student discipline and believed that it was a deterrent to student misbehavior. See generally, F. Reardon & R. Reynolds, CORPORAL PUNISHMENT IN PENNSYLVANIA: A REPORT TO THE PENNSYLVANIA BOARD OF EDUCATION (1975).

## 3. Human Dignity.

Having failed to show that severe corporal punishment violates public perceptions of standards of decency, plaintiffs next contend that corporal punishment violates the

concept of human dignity embodied in the Eighth Amendment. Plaintiffs begin with the proposition, stated in *Trop v. Dulles*, 356 U.S. 86, 100 (1958), that, "Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect." In *Trop*, of course, the non-traditional remedy took the form of involuntary denationalization, which was clearly a novel punishment in our jurisprudence. Plaintiffs attempt to place corporal punishment in the same classification by asserting, without any authority for the proposition, that corporal punishment in the nation's public schools is neither a traditional nor customarily imposed form of discipline. This argument is without merit. Corporal punishment has been recognized as an acceptable method of school discipline since the earliest days of American Education. H. Falk, *CORPORAL PUNISHMENT: A SOCIAL INTERPRETATION OF ITS THEORY AND PRACTICE IN THE SCHOOLS OF THE UNITED STATES* 20 (1941). Moreover, many teachers, educational psychologists and school administrators continue to believe that corporal punishment is a particularly useful disciplinary tool in specific circumstances.

In *Ware v. Estes*, 328 F.Supp. 657 (N.D. Tex. 1971), *aff'd* 458 F.2d 1360 (5th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972), for instance, the Dallas Superintendent of Schools testified that his school board had adopted corporal punishment only after the question was discussed with Professor B. F. Skinner of Harvard University, an authority on child and educational psychology. The Superintendent testified "that the District's policy on corporal punishment reflects the philosophy of Dr. Skinner, i.e., in some cases corporal punishment will be helpful." 328 F. Supp. at 659. In *Glaser v. Marietta*, 351 F. Supp. 555, 557

(W.D. Pa. 1972), another student discipline case, the court found that, "The expert testimony was evenly balanced, indicating that there is indeed a sharp difference of opinion among those who have done extensive work and study on the problem." In these circumstances, the court found that the wisdom of corporal punishment was not a question for the judiciary. Another authority states that, "Some students with emotional and/or behavioral problems do not respond to the counseling of the school or to less severe types of punishment. Quite often the youngster must undergo rapid improvement if he is to remain at school at all, and we cannot escape from the fact that some pupils do show a favorable change in their overt behavior after corporal punishment is administered." K. Larson & M. Karpas, *EFFECTIVE SECONDARY SCHOOL DISCIPLINE* 148 (1963).

Plaintiffs contend that, "Severe corporal punishment is an extreme sanction, justified only for some extreme offense, if it is permissible at all." *Petitioners' Brief*, 39. Plaintiffs then proceed to "determine whether it may be licensed" by looking to the death penalty cases for analogy. *Id.* Initially, this argument is suspect because it ignores the numerous factors which the common law has identified to determine the reasonableness of corporal punishment of school children. See pp. 24-26, *supra*. Plaintiffs would abandon these numerous considerations and focus entirely on the seriousness of the offense. This approach is inappropriate because it fails to take account of the fact that punishment in the educational environment is action taken in the interest of the student as well as society. The theory of school discipline is therapeutic, not retributive. Moreover, the argument assumes a definitional precision which has no basis in reality. It assumes that *severe* corporal



punishment, like the ultimate sanction of death, is an objective phenomenon which can be universally identified and agreed upon. *See* discussion *infra* at pp. 46-47.

Most important, plaintiffs' argument assumes that severe corporal punishment does not admit to degrees or variations. For purposes of plaintiffs' analysis, all severe corporal punishment must be alike in degree of severity. Indeed, in plaintiffs' view, it is uniformly draconian. Little imagination is required to recognize that an infinite variety of disciplinary circumstances may arise, in which an infinite number of different qualities of corporal punishment may be required and administered. It is precisely this infinite variety of factual circumstances which it was the genius of the common law to recognize and accommodate. Plaintiffs' "severe corporal punishment," on the other hand, is an empty concept which describes nothing.<sup>2</sup>

Plaintiffs contend that severe corporal punishment offends basic concepts of human dignity, and is excessive in a constitutional sense, because the suffering which it generates does not serve any valid societal purpose. While behavior modification and the maintenance of order and decorum are obviously legitimate disciplinary goals, plain-

<sup>2</sup>Although plaintiffs attempt to distinguish routine corporal punishment from severe corporal punishment, that distinction is clearly impossible to make on an objective basis. Nonetheless, if plaintiffs' theory is accepted by this Court, school officials will be required to make that distinction at the risk of constitutional liability. "These officials will now act at the peril of some judge or jury subsequently finding that a good-faith belief as to the applicable law was mistaken and hence actionable." *Wood v. Strickland*, 420 U.S. 308, 329 (1975) (Powell, J., concurring in part and dissenting in part) (footnote omitted). The effect of this burden will likely be a reluctance on the part of school officials to take vigorous action to maintain discipline.

tiffs believe that severe corporal punishment is not an efficient or effective means of securing these ends. On the basis of their opinion as to the efficacy of severe corporal punishment, plaintiffs would have this Court declare that it is cruel and unusual punishment. The state of public and professional opinion about reasonable corporal punishment is not, however, uniformly on one side of the issue. There is a great difference of opinion as to its utility and desirability and, in these circumstances, the Court must be reluctant to substitute its judgment for that of professional educators and politically responsible local school board members. The state of opinion here is akin to that concerning the death penalty, which was discussed by Mr. Justice White in his dissent in *Roberts v. Louisiana*, ..... U.S. ...., 96 S.Ct. 3001, 3016-3017 (1976) (footnote omitted):

The debate on this subject started generations ago and is still in progress. Each side has a plethora of fact and opinion in support of its position, some of it quite old and some of it very new; but neither has yet silenced the other. I need not detail these connecting materials, most of which are familiar sources. It is quite apparent that the relative efficacy of capital punishment and life imprisonment to deter others from crime remains a matter about which reasonable men and reasonable legislators may easily differ. In this posture of the case, it would be neither a proper or wise exercise of the power of judicial review to refuse to accept the reasonable conclusions of Congress and 35 state legislatures that there are indeed certain circumstances in which the death penalty is the more efficacious deterrent of crime.

It will not do to denigrate these legislative judgments as some form of vestigial savagery or as purely retributive in motivation; for they are solemn judgments, reasonably based, that imposition of the death penalty will save the lives of innocent persons. This

concern for life and human values and the sincere efforts of the States to pursue them are matters of the greatest moment with which the judiciary should be most reluctant to interfere. The issue is not whether, had we been legislators, we would have supported or opposed the capital punishment statutes presently before us. The question here under discussion is whether the Eighth Amendment requires us to interfere with the enforcement of these statutes on the grounds that a sentence of life imprisonment for the crimes at issue would as well have served the ends of criminal justice. In my view, the Eighth Amendment provides no warrant for overturning these convictions on these grounds.

While some educators may believe that corporal punishment is an unacceptable method of maintaining school discipline, the evidence shows that a majority of state legislatures do not share that opinion. For the most part, the states follow the traditional rule that school officials may use reasonable corporal punishment. In some circumstances, that punishment may necessarily be severe. The state legislatures, state boards of education and local school boards follow this principle. Plaintiffs have not met their very heavy burden of showing that the use of reasonable corporal punishment is so devoid of reason as to deny the existence of any valid societal purpose. In the absence of such a showing, the informed judgment of local officials must stand. The wisdom of corporal punishment is a question within the competence of the people and their elected officials. In the school situation, these facts attain particular significance because "public education in our Nation is committed to the control of state and local authorities" and "[c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (footnote omitted).

Plaintiffs contend, finally, that the particular punishments which form the subject matter of this action violated the Eighth Amendment, even if all severe corporal punishment is not cruel and unusual. In this respect, it is important to note that the trial court dismissed the complaint in this action only after the close of plaintiffs' case. The district court heard the live testimony of the students who allegedly received the punishments at issue. The plaintiffs also called an expert witness to testify on the effects of corporal punishment, and they entered into a stipulation regarding the opinions of the two physicians who examined James Ingraham. *Appendix*, 20-23. Dr. Whigham, the Superintendent of Schools, testified concerning the theory and practice of corporal punishment in the Dade County School System. *Appendix*, 28-57. He was subject to full and effective examination and cross-examination. The trial court had ample opportunity to judge the credibility and demeanor of a number of witnesses, many of whom testified about the facts of specific punishments that were allegedly inflicted on class members during the class period. From this evidence, the court concluded that, for the most part, "the punishments administered have been unremarkable in physical severity." *Appendix*, 152.

Moreover, the trial court must have weighed the evidence most favorably to the plaintiffs because the court assumed that the Eighth Amendment applied in the school context and that corporal punishment could be sufficiently severe to violate the Constitution. The Court said:

Corporal punishment might be meted out under such circumstances and with such severity as to amount to a deprivation of a constitutional right and thus give rise to recovery in a "civil rights" case.

*Appendix*, 148.



Even applying this legal standard, however, the trial court went on to find, as a matter of fact, that the punishments forming the basis of the action were not sufficiently grave to constitute cruel and unusual punishment. The trial court noted that Ingraham's case rested on one instance of punishment, during which he received 20 licks with a wooden paddle, and that Andrews was paddled several times, receiving no more than five licks on any one occasion. The court concluded that, "The undisputed facts regarding Ingraham and Andrews cannot demonstrate the elements of severity, arbitrary infliction, unacceptability in terms of contemporary standards, or gross disproportion which are necessary to bring 'punishment' to the constitutional level of 'cruel and unusual punishment.'" *Appendix*, 148-149.

In effect, plaintiffs' only grievance with the trial court's decision is that it judged plaintiffs' evidence inadequate to support their legal theory, which the trial court accepted as correct. Without reference to whether the trial court's findings are clearly erroneous, plaintiffs now attempt to relitigate those factual issues in this Court. They argue that the whole pattern of punishment at Drew Junior High School lacked any educational justification, served no societal purpose, resulted in gratuitous inflictions of suffering, and was so excessive as to violate the Eighth Amendment. The principal obstacle to this analysis lies in the contrary factual conclusions of the trial judge in this case, who heard all the evidence first-hand and weighed it in light of the legal standard most favorable to plaintiffs' case. It would be improper for this Court to set aside those factual conclusions.

Plaintiffs' contention that severe corporal punishment violates the Eighth Amendment is without merit and the judgment of the Court of Appeals must be affirmed.

## II.

### SEVERE CORPORAL PUNISHMENT, IN THE ABSENCE OF NOTICE AND AN OPPORTUNITY TO BE HEARD, DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

#### A. No Liberty Or Property Interest Is Implicated By The Use Of Severe Corporal Punishment As A School Disciplinary Measure.

The Due Process Clause of the Fourteenth Amendment provides that the government may not deprive citizens of liberty or property without due process of law. To determine whether due process applies, the threshold inquiry must consider whether a protected liberty or property interest is at stake. In *Goss v. Lopez*, 419 U.S. 565 (1975), for instance, the Court found that Ohio had created a property interest in education and that this interest could not be wholly withdrawn, even for a short period of time, without minimal due process. The students in *Goss* had been suspended from school for periods up to ten days, without notice or an opportunity to be heard. This Court held that "A 10-day suspension from school is not *de minimis* in our view and may not be imposed in complete disregard of the Due Process Clause". *Id.*, 576. In determining what process was due, the Court carefully considered the special characteristics of the educational process and concluded that notice and an opportunity to be heard were required, but that notice need not be afforded prior to the hearing and that the hearing itself need only be "an informal give-and-take between student and disciplinarian." *Id.*, 584. See Wilkinson, *Goss v. Lopez: The Supreme Court As School Superintendent*, 1975 Sup. Ct. Rev. 25, 40. Plaintiffs concede that the state-created property interest

in public education, which formed the basis for decision in *Goss*, is not implicated by the facts of this case.<sup>3</sup> Plain-

<sup>3</sup> In *Paul v. Davis*, ..... U.S. ...., 96 S.Ct. 1155, 1165 (1976), the Court explained the doctrinal source of liberty and property interests:

It is apparent from our decisions that there exist a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status. (Footnote omitted).

Once the State has granted a specific property interest, it may not remove or significantly alter that interest without compliance with the requirements of due process. It is clear, nonetheless, that the state has an absolute right to determine the parameters of the property interest when it is initially bestowed: the property interest created is that which the state chooses to create. "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The Court recently reaffirmed this principle in *Bishop v. Wood*, ..... U.S. ...., 96 S.Ct. 2074, 2077-78 (1976) in which it held that "the sufficiency of the claim of entitlement [to continued public employment] must be decided by reference to state law."

Plaintiffs are unable to show that a property interest is affected here. The state legislature has created a property interest in education, but it has also explicitly limited that property interest by providing that students may be subject to corporal punishment. Fla.Stat. Ann. §232.27. While the state has granted the right to attend public school, it has not granted immunity from corporal punishment as part of that right. Indeed, it has explicitly provided the opposite by statute. Unlike *Goss v. Lopez*, 419 U.S. 565 (1975),

(Footnote continued)

tiffs emphasize that, "The right involved in this case is the right to liberty." *Petitioners' Brief*, 43.<sup>4</sup>

A liberty interest, within the meaning of the Due Process Clause, may be created by state law or by one of the provisions of the Bill of Rights which has been "incorporated" into the Fourteenth Amendment. *Paul v. Davis*, ..... U.S. ...., 96 S.Ct. 1155 (1976); *Meachum v. Fano*,

(Footnote continued)

the property interest here has not been withdrawn in any sense; it has merely been regulated according to the terms on which it was initially granted. Moreover, the purpose of corporal punishment is to maintain order and discipline by means calculated to maintain the student's property interest. Corporal punishment seeks to affect unsatisfactory behavior within the school environment rather than remove the student from that environment. Insofar as property is concerned, *Goss* does not restrict the state's ability to impose reasonable methods of discipline within the schoolhouse. The state has established the right to attend school and it may determine the contours of that right. See *Bishop*, *supra*, 96 S.Ct. at 2077-78.

<sup>4</sup> Somewhat inconsistently, plaintiffs suggest that a property interest may be at stake after all because James Ingraham's injuries resulted in his absence from school for a short period of time. *Petitioner's Brief*, 45. Plaintiffs seem to argue that this purely fortuitous element of Ingraham's punishment resulted in a de facto suspension which, under *Goss v. Lopez*, 419 U.S. 565 (1975), requires that the action taken be preceded by notice and hearing. While this argument may have some superficial appeal, it is clear that the degree of injury suffered by James Ingraham was unprecedented. Plaintiff's contention overlooks the very essence of corporal punishment: the purpose of corporal punishment is not to remove a child from school, its purpose is to affect his behavior so that he will be able to continue in school. In these circumstances, it would be odd indeed for the Constitution to require notice and opportunity to be heard prior to the imposition of corporal punishment on the ground that the punishment may, in an extremely rare case, result in the occurrence which the punishment imposed seeks to avoid.



..... U.S. ...., 96 S.Ct. 2532 (1976). Plaintiffs concede that no state-created liberty interest entitled them to the protection of the Due Process Clause because Florida law has created no liberty interest that could be damaged by the use of corporal punishment in the schools. Indeed, Florida law explicitly authorizes the use of corporal punishment as a form of discipline in the public schools. Fla. Stat. Ann. §232.27.

According to plaintiffs' argument, the liberty interest involved here is the "right to be free from unjustified physical assaults," which they say is grounded in the Fourth Amendment. *Petitioners' Brief*, 43. Plaintiffs broadly construe the Fourth Amendment as if it afforded constitutional protection to the common law right of freedom from interference with the person. It is readily apparent, of course, that this theory is inconsistent with *Screws v. United States*, 325 U.S. 91, 108-09 (1945), in which Mr. Justice Douglas said that, "The fact that a prisoner is assaulted, injured or even murdered by state officials does not necessarily mean that he is deprived of any right protected by the Constitution or laws of the United States." In *Paul v. Davis*, ..... U.S. ...., 96 S.Ct. 1155, 1160 (1976), the Court quoted this language with approval and rejected the theory that the Due Process Clause should extend to citizens the "right to be free of injury wherever the state may be characterized as the tortfeasor." The Court noted that the civil rights statutes do not constitute "a body of general federal tort law." *Id.*, 1160. Likewise, in *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied*, *Employee-Officer John v. Johnson*, 414 U.S. 1033 (1973), Judge Friendly noted that, "Certainly the constitutional protection is nowhere nearly so extensive as that afforded by the common law tort action for battery, which makes actionable any intentional and unpermitted contact

with the plaintiff's person or anything attached to it and practically identified with it, see Prosser, Torts §9 (4th ed. 1971); still less is it as extensive as that afforded by the common law tort action for assault, redressing 'Any act of such a nature as to excite an apprehension of battery.' " The court concluded that "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." *Id.*

In *Paul*, the Court explained that its reluctance to expand the scope of the Due Process Clause to encompass a remedy for all torts cognizable under state law was not inconsistent with its holding in *Monroe v. Pape*, 365 U.S. 167 (1961), because the complaint in *Monroe* "alleged an unreasonable search and seizure which violated specific guarantees 'contained in the Fourth Amendment.' " *Paul*, *supra* at 1160. In the present case, plaintiffs attempt once again to create a general body of federal constitutional tort law. Because the Court has foreclosed the possibility of plaintiffs' reaching that result through less subtle means, plaintiffs now seek to expand the meaning of the Fourth Amendment to encompass the right to be free from physical interference, a right which has traditionally been a matter of tort law within the jurisdiction of the states. Plaintiffs re-christen this common law right as a liberty interest—"the right to be free from unjustified physical assaults"—and proceed to argue that it is sufficient not only to state a claim under Section 1983, but also to mandate procedural protections before the state may act. This argument must surely fail.

The central meaning of the Fourth Amendment is to guarantee the right of the people to be secure in their persons, papers, houses and effects, against unreasonable searches and seizures. Only tortured linguistic analysis would suggest that corporal discipline of public school

children is either a search or a seizure within the meaning of the Fourth Amendment. Indeed, plaintiffs put forth no argument to show that corporal punishment constitutes either a search or a seizure. Instead, they attempt to extract from the "spirit" of the Fourth Amendment a generalized right to be free from unjustified assaults. They are unable to provide any authority for this new constitutional right, either directly or by analogy. Although *Monroe* would seem to provide a fertile ground for analysis, plaintiffs studiously ignore *Monroe* because this Court, in *Paul*, emphasized that the earlier case was a search and seizure case and explicitly rejected the notion that it stands for such a broad principle. *Paul, supra* at 1160. Instead, plaintiffs emphasize the Court's observation in *Schmerber v. California*, 384 U.S. 757, 767 (1966), that, "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State," as well as similarly broad language in *Terry v. Ohio*, 392 U.S. 1, 24-25 (1968).<sup>5</sup> While this language appears felicitous for plaintiffs' argument in the abstract, the context of both cases indicate that the language is

<sup>5</sup> In *Terry*, the Court said:

Even a limited search of the outer clothing for weapons constitutes a severe, though brief intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.

*Id.*, 24-25.

While the Court spoke of "cherished personal security" in *Terry*, its observation must be considered in terms of the factual context of that case. The security it noted was not an amorphous or generalized sense of personality, but rather the traditional Fourth Amendment right to be secure against unreasonable searches and seizures. Properly considered, this language does not support plaintiffs' contention that the Fourth Amendment should be broadly construed to encompass the right to be free from all unwarranted physical intrusions.

wholly inapposite to the broad theory which plaintiffs attempt to extract from the Fourth Amendment.

Both *Terry* and *Schmerber* were classic search and seizure cases. In neither case was there any question about the application of the Fourth Amendment to the particular governmental activities involved. In *Terry*, the Court recognized that the stop and frisk technique used by the police officer amounted to both a seizure of the person and a search incident to the seizure. The Court nonetheless upheld the privilege of a police officer to stop and frisk a citizen without a warrant, even though this action represented "a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment." *Terry, supra* at 17. In *Schmerber*, the Court likewise upheld the warrantless extraction of a blood sample from the body of a criminal suspect. The extraction of blood from a suspect's body was clearly a search within the meaning of the Fourth Amendment, but the Court held that it was not unreasonable in the circumstances. Neither *Terry* nor *Schmerber* supports the broad Fourth Amendment right to freedom from physical interference which plaintiffs now ask this Court to sanction. In the past, moreover, the Court has held that the protection of the Fourth Amendment extends only to unreasonable searches and seizures; it has consistently declined to transform the Fourth Amendment into a more generalized guarantee of privacy.

In *Katz v. United States*, 389 U.S. 347, 350 (1967), the Court said that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'" Moreover, the Court acknowledged that "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the in-



dividual states." *Id.*, 350-351 (emphasis in original) (footnotes omitted). The general right to be free from interference with the person is no more a part of the Fourth Amendment protection against unreasonable seizures and searches than was the generalized right to privacy that was unsuccessfully urged upon the Court in *Katz*. Indeed, the right to be free from interference with the person is, like the right to privacy, a creature of state law. Having failed to show that corporal punishment is a search or a seizure, in a constitutional sense, plaintiffs' Fourth Amendment argument must fall.

Even if the Fourth Amendment could be construed as a general prohibition against physical interference, that prohibition could not, consistently with the language of the Fourth Amendment, be absolute. Whatever protection the Fourth Amendment affords must be limited to intrusions that are unreasonable. An absolute freedom from physical interference would necessarily be inconsistent with the social interaction implicit in the nature of civil society and our "concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The limitations which the law places on a citizen's physical liberty are both numerous and substantial. A citizen may be required, for instance, to submit to vaccination, regardless of his personal beliefs or preferences. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). His attendance at a state university may be conditioned on his participation in a military training program which is repugnant to his religious principles. *Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934). He may be stopped and frisked whenever a police officer reasonably fears for his own safety or the safety of others. *Terry, supra*. In some circumstances, he may be arrested without a warrant if the police officer has probable cause. *Trupiano v. United States*, 334 U.S. 699 (1948). Of greatest

significance, perhaps, is that a woman's right to freedom from physical interference does not include the absolute right to an abortion. *Roe v. Wade*, 410 U.S. 113 (1973).

Plaintiffs attempt to deal with this element of the Fourth Amendment by arguing that the amendment protects against *unjustified* physical assaults. Even assuming that this statement is accurate and that paddling is an assault, plaintiffs make no effort to demonstrate that paddling would be unjustified. In light of the pervasive historical evidence supporting the privilege of school personnel to use reasonable corporal punishment to maintain discipline and order, plaintiffs must shoulder the burden of demonstrating that it is unjustified. They have failed to do so. Plaintiffs had a full hearing in the district court. They had an opportunity to present evidence to show that the infringement placed on their alleged Fourth Amendment right to physical integrity was unreasonable. The record does not reveal any evidence directed to this issue, except for the expert testimony which questioned the efficacy of corporal punishment as an educational tool. The two opinions of the Court of Appeals also indicate that the Fourth Amendment argument was not made in that court. Plaintiffs' failure to make this novel argument until this stage of the proceedings increases the difficulty of analysis. Nonetheless, the widespread historical and contemporary acceptance of corporal punishment as a means of school discipline would seem to indicate that this invasion of plaintiffs' liberty is not *per se* unreasonable. Moreover, the Dade County Superintendent of Schools testified in the district court that he believed corporal punishment served an important disciplinary function in circumstances where disciplinary action was required, but suspension would be unmerited. He said:

With reference to the two [forms of punishment] that you specified there, suspension or expulsion versus corporal punishment; suspension or expulsion would terminate either temporarily or for a longer period of time, the education of the youngster, and he [the administrator] needs to weigh that step, which is a very serious step, against whether the corporal punishment would, in fact, bring some improvement in the situation; whether it is a useful procedure or technique with this particular youngster and that particular situation.

*Appendix, 51.*

Indeed, plaintiffs seem to concede that corporal punishment is neither *per se* unreasonable nor a *per se* violation of the Fourth Amendment. To make their argument appear more reasonable, plaintiffs distinguish between *mere* corporal punishment and *severe* corporal punishment; they argue that the latter violates the Fourth Amendment while the former does not. Their definition of severe corporal punishment is extremely unorthodox. For purposes of Fourth Amendment analysis, plaintiffs state that, "We do not include a brief hand spanking or a slapped face within the definition of 'severe' corporal punishment. But one 'lick' with a paddle . . . is 'a severe though brief intrusion upon cherished personal security.'" *Petitioners' Brief*, 44 n.19. This definition of the liberty interest at stake in school discipline is obviously artificial. Moreover, the definition is inconsistent with the generally recognized tort principles which plaintiffs seek to elevate to constitutional status. If plaintiffs' interest consists in being free from unjustified physical assaults, it is irrational to define that interest in terms of the instrument used to invade it, rather than in terms of the nature of the interest itself. One must wonder at the logic of an argument which supposes

that one stroke of a paddle on the buttocks is more likely to affront a person's sense of human dignity than a slap across the face. One proponent of increased judicial review of school discipline decisions has noted that, "A de minimis level exists here as elsewhere; a swat on the bottom is not inherently harmful to either the anatomy or the psyche." Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U.Pa. L.Rev. 545, 583 (1971). At the same time, a slap on the face has traditionally been considered to be the most provocative type of battery. Plaintiffs' attempt to show that severe but reasonable corporal punishment violates the Fourth Amendment must fall by the weight of its own irrationality.

In a final desperate attempt to demonstrate the existence of a liberty interest in this case, plaintiffs state that James Ingraham suffered a loss of reputation among his brothers and sisters because of the discomfort which he suffered in his buttocks. *Petitioners' Brief*, 47. That a child should have a constitutional interest in not being teased by his siblings is a novel proposition indeed. In *Paul v. Davis*, ..... U.S. ...., 96 S.Ct. 1155 (1976), the Court held that the subject of a police bulletin on "active shoplifters," which was circulated to all commercial establishments in Louisville, did not have an actionable claim for defamation under Section 1983. The Court noted that any harm or injury to reputation which the plaintiff may have suffered, "even where as here inflicted by an officer of the State, does not result in a deprivation of any 'liberty' or 'property' recognized by state or federal law, nor has it worked any change of respondent's status as theretofore recognized under the State's laws." *Id.*, 1166. Consequently, the Court held that a mere interest in reputation "is neither 'liberty' nor 'property' guaranteed against state depriva-



tion without due process of law." *Id.* If the substantial damage to reputation a citizen suffers by being branded as an "active shoplifter" is insufficient to trigger due process, it is frivolous to suggest that a youngster's reputation among his brothers and sisters is entitled to constitutional protection on the same theory.

Plaintiffs have failed to demonstrate the existence in this case of any liberty interest that would require protection under the Due Process Clause.

**B. Plaintiffs Have Demonstrated No Liberty Interest Which Would Entitle Them To Notice And An Opportunity To Be Heard Prior To The Imposition Of Corporal Punishment.**

Even if plaintiffs were able to persuade this Court that the Fourth Amendment should be expansively construed to encompass a general liberty interest in freedom from assault, it does not follow that plaintiffs would have a Fourteenth Amendment right to notice and an opportunity to be heard prior to the administration of corporal punishment. It is beyond dispute that the possible infringement of many types of liberty interests may require that the affected citizen be given notice and an opportunity to be heard. Indeed, Judge Friendly has recently suggested that, "Particularly after *Goss v. Lopez* it becomes pertinent to ask whether government can do *anything* to a citizen without affording him 'some kind of hearing.'" Friendly, "*Some Kind of Hearing*," 123 U.Pa.L.Rev. 1267, 1275 (1975) (emphasis added). Nonetheless, this Court has recently rejected "the notion that *any* grievous loss visited upon a person by the State is sufficient to invoke the procedural protections of the Due Process Clause." *Meachum v. Fano*, ..... U.S. ...., 96 S.Ct. 2532, 2538 (1976) (emphasis in original). In determining whether the Due Process

Clause should be applied in a particular situation, it is necessary to consider both the nature of the interest asserted and the administrative context in which it is asserted. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring). Inasmuch as the plaintiffs base their alleged constitutional right to freedom from assault on the Fourth Amendment, it is necessary to examine the type of protection usually afforded to liberty interests created by the Fourth Amendment.

In its more orthodox applications, a citizen's Fourth Amendment liberty interest has not been construed to require prior notice and hearing, pursuant to the Due Process Clause of the Fourteenth Amendment, before the government may act to take it away. For instance, a police officer may stop and frisk a citizen when the officer reasonably fears for his own safety or the safety of others. A stop is clearly a seizure, and a frisk is a search. Together, they amount to a significant invasion of the citizen's liberty; they "may inflict great indignity and arouse strong resentment." *Terry, supra* at 17. It is clear, nonetheless, that a citizen has no right to prior notice or hearing in these circumstances. Likewise, a police officer may sometimes arrest a suspect upon his own determination of probable cause, without securing a warrant for the citizen's arrest. The resulting deprivation of liberty will, at least temporarily, be total. The collateral effects may be serious. "Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). Nonetheless, a citizen may be arrested and confined without prior notice or an opportunity to be heard. Finally, the warrant process itself does not afford notice and hearing. A probable cause hearing before an impartial magis-

trate is an *ex parte* proceeding; the suspect has no right to notice and he has no "opportunity," to use plaintiffs' words, "to tell his side of the story." *Petitioner's Brief*, 51. In short, the Fourth Amendment right to liberty is a special right. The right itself is not absolute because the Fourth Amendment protects only against "unreasonable" searches and seizures. Moreover, it is always limited in its enforcement by the exigencies of the criminal law context and it has never been construed to require notice and an opportunity to be heard.

Traditionally, remedies for the unwarranted invasion of Fourth Amendment rights have been limited to the granting of retrospective relief. Police officers who act without probable cause or use excessive force may be subject to state criminal prosecution. They may also be subject to civil liability under state tort law or in some cases, the federal civil rights acts. See *Monroe v. Pape*, 365 U.S. 167 (1961). Evidence that is improperly seized may be excluded at a subsequent criminal trial. *Mapp v. Ohio*, 367 U.S. 643 (1961). The only mechanism available to protect Fourth Amendment rights on a prospective basis is the probable cause hearing which does not, however, grant the citizen any prophylactic relief in the sense of an opportunity to be heard pursuant to notice. Against this traditional background of retrospective protection of Fourth Amendment rights, it is clear that plaintiffs now seek to have this Court sanction a previously unrecognized right to physical integrity under the Fourth Amendment and they seek to protect that right by legislating a new prophylactic rule unknown in the Fourth Amendment area. It is difficult to believe that the alleged invasion of Fourth Amendment rights in the school discipline context should require more elaborate safeguards than those available in the criminal law context.

In determining whether this rule should be adopted to protect plaintiffs' alleged Fourth Amendment liberty interests, in the school discipline context, this Court must consider both the nature of the alleged liberty interest at stake and the peculiar features of the particular administrative context in which the interest is asserted. Mr. Justice Frankfurter has described the nature of this balancing process:

It may fairly be said that, barring only occasional and temporary lapses, this Court has not sought unduly to confine those who have the responsibility of governing by giving the great concept of due process doctrinaire scope. The Court has responded to the infinite variety and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in another . . . The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

*Joint Anti-Fascist Refugee Committee v. McGrath*, *supra* at 163 (Frankfurter, J., concurring) (citations omitted).

In *Meachum v. Fano*, ..... U.S. ...., 96 S.Ct. 2532 (1976), the Court recently expressed its approval of the principle that Due Process analysis requires consideration of the nature of the particular administrative context as well as the liberty interest at stake. In *Meachum*, a number of Massachusetts state prisoners challenged the constitutional adequacy of administrative procedures which resulted in their transfer to different institutions, where the



conditions of their confinement were concededly more disagreeable than they had been at their former prison. The Court was asked to determine whether “*any* change in the conditions of confinement having a substantial adverse impact on the prisoner involved is sufficient to invoke the protection of the Due Process Clause.” *Id.*, 2538 (emphasis in original). While the Court noted the necessarily limited nature of a prisoner’s liberty interest, it did not rest its decision on that basis alone. The Court has previously asserted that prison regulations require “a reasonable accommodation between the interests of the inmates and the needs of the institution.” *Wolff v. McDonnell*, 418 U.S. 539, 572 (1974). In *Meachum*, the Court found it necessary to look beyond the “substantial adverse effect” of the administrative action involved to the effect that recognition of procedural protections would necessarily have on the administrative process. “[T]o hold as we are urged to do that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the Due Process Clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts.” *Meachum, supra* at 2538. The Court noted that decisions concerning institutional transfers are made for a variety of reasons and “often involve no more than informed predictions as to what would . . . best serve institutional security or the safety and welfare of the inmate.” *Id.* Moreover, “[h]olding that arrangements like this are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges.” *Id.*, 2540.

In *Meachum*, the Court declined to involve itself in secondary level decision-making in the prison context. The reasons which support that approach in the prison context are equally forceful in the case of public school disciplinary proceedings which do not entail suspension or expulsion from the institution. The Court has consistently recognized that:

Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and *which do not directly and sharply implicate basic constitutional values.*

*Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (emphasis added) (footnote omitted).

It is appropriate for the federal courts to intervene in school disciplinary decisions when the sanction amounts to a withdrawal of the important privilege of public school attendance. *Goss v. Lopez*, 419 U.S. 565 (1975). It is neither appropriate nor necessary, however, for the federal courts to become enmeshed in disciplinary decisions that involve purely intramural sanctions of transient significance, such as corporal punishment. These decisions are properly the concern of state and local officials and are subject to adequate review in the state courts. “We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require judicial review for every such

error." *Bishop v. Wood*, ..... U.S. ...., 96 S.Ct. 2074, 2080 (1976).<sup>6</sup>

This Court has frequently recognized that the constitutional rights of students are not absolute. They are limited in the first instance because "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults." *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944). See also, *McKiever v. Pennsylvania*, 403 U.S. 528 (1971); *Ginsberg v. New York*, 390 U.S. 629 (1968); *Byofsky v. Borough of Middletown*, 401 F. Supp. 1242 (M.D. Pa. 1975). They are further limited in the school context because they must be balanced against the needs of the educational institution whose principal duty is to impart knowledge. Even in the special area of First Amendment freedom, this Court has recognized that the rights of both teachers and students must be "applied in light of the special characteristics of the school environment." *Tinker v. Des Moines School District*, 393 U.S. 503, 506 (1969).

<sup>6</sup> If plaintiffs' theory is accepted, it would be unreasonable to provide due process protections when the sanction is corporal punishment, but to withhold them in the case of other, at least equally punitive sanctions. The purpose of corporal punishment is to impose a less serious punishment than suspension or expulsion. It is one of many disciplinary measures potentially available. It is by no means the most serious or lasting in its effects. Decisions to make a student stay after school every day for a week, to give a student a less than superior grade, to not play a high school athlete on the day a college football recruiter is in the stands could all have a more serious effect on a student's future than the infliction of even the most severe paddling. See *Dallam v. Cumberland Valley School District*, 391 F.Supp. 358 (M.D. Pa. 1975); *Zeller v. Donegal School District Board*, 517 F.2d 600 (3rd Cir. 1975) (*en banc*). The difficulty of fixing a constitutional limitation to plaintiffs' theory is demonstrated by the distinction they attempt to draw between paddling, which they find unconstitutional, and a slap on the face, which they find acceptable. See *Petitioner's Brief*, 44 n.19.

The exigencies of school discipline are obvious. As Mr. Justice Powell noted in *Goss*, "[i]t is common knowledge that maintaining order and reasonable decorum in school buildings and classrooms is a major educational problem, and one which has increased significantly in magnitude in recent years." *Goss, supra* at 591-592 (Powell, J., dissenting) (footnote omitted). At the same time, securing adequate financial resources to carry on the educational business of the schools has become an increasingly difficult task for state and local officials. To the extent that procedural requirements are imposed on the school disciplinary process, these scarce resources will necessarily be diverted from the primary business of academic instruction and the quality of education in our public schools will suffer. "The cost of supporting discipline proceedings cannot be dismissed lightly by contrasting its 'economic' character to the 'human' dimension represented by the threat to the student's liberty, for the economic costs of fairer disciplinary procedures necessarily result in a shifting of scarce resources from the purposes to which they would otherwise be put." Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U.Pa. L.Rev. 545, 574 (1971). This fact is worth serious consideration in determining whether due process requires notice and an opportunity to be heard in cases of minor discipline problems that result in a sanction less severe than suspension. The danger cannot be overemphasized. Mr. Justice Powell noted in *Goss* that statistical evidence concerning the number of school suspensions in the country "demonstrate[s] that if hearings were required for a substantial percentage of short-term suspen-



sions, school authorities would have time to do little else." *Goss, supra* at 592 (Powell, J., dissenting).<sup>7</sup>

If a hearing requirement is applied to lesser disciplinary sanctions such as corporal punishment, the amount of school time devoted to discipline will again increase by a geometric proportion. The danger with this approach is, of course, that greater procedural rights may result in severer sanctions which school officials would not inflict if they were allowed to exercise their professional judgment in discipline matters. The most obvious way to cope with the increased costs of disciplinary proceedings would be a greater reliance by school officials on the ultimate sanction of suspension or expulsion. If the same procedures must accompany minor disciplinary proceedings, school officials may be driven by economic necessity to choose the more serious sanction because of its greater

<sup>7</sup> If the Court were to hold that only the imposition of *severe* corporal punishment constitutionally requires notice and hearing, an intolerable practical burden would be placed on school personnel. The severity of corporal punishment is never self-evident in that it depends on circumstances such as the age and disposition of the student, the conduct for which he is liable to punishment, and the degree of force to be applied. Plaintiffs contend that a slap on the face is not severe corporal punishment while one lick with a paddle is severe corporal punishment. If nothing else, plaintiffs' argument demonstrates the impossibility of making categorical distinctions here. Yet, plaintiffs would fix constitutional liability on this fragile distinction. Inasmuch as school officials would be forced to make disciplinary decisions that would require them to run the risk of "predicting the future course of constitutional law," *Wood v. Strickland*, 420 U.S. 308, 322 (1975), *Pierson v. Ray*, 386 U.S. 547, 557 (1967), it is likely that they would simply adopt the undesirable policy of granting hearings in every case. This result would preclude effective school discipline.

general and special deterrence value. This result would be undesirable because it would impose on school officials artificial criteria for making disciplinary decisions when society, the school and the student would, doubtlessly, best be served by an exercise of the school official's informed professional judgment. See *Wilkinson, Goss v. Lopez: The Supreme Court As School Superintendent*, 1975 Sup.Ct. Rev. 25, 62. This Court must ever be mindful of the continuous accounting which professional educators must give to their local school boards who are, in turn, constantly audited by the communities which choose them. "[I]f the work of the schools is to go forward," the federal courts must not needlessly prevent the "conscientious school decision-maker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students." *Wood v. Strickland*, 420 U.S. 308, 320-321 (1975).

The matters which plaintiffs now seek to have heard in a federal court are matters within the special interest and competence of the states, which must be "left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Moreover, it is not an area in which the states have stood idle.

Several hundred years of common law development as well as the legislative enactments of the several states, have set out both the limits of the student's interest in his physical integrity and the privilege of those who are responsible for the education of the student and his schoolmates. The result of these developments has been a delicate accommodation of the interests of the individual, his schoolmates and society. The majority of jurisdictions, by statute or by adherence to common law principles, permit a teacher to take immediate disciplinary action and,

if necessary, administer reasonable corporal punishment. The teacher acts, of course, at his peril. If the punishment that he inflicts is later found to be excessive, he will be subject to possible civil and criminal liability. See E. Ruettër & R. Hamilton, *LAW OF PUBLIC EDUCATION*, 514-18 (1970); N. Edwards, *THE COURTS AND THE PUBLIC SCHOOLS* 610-15 (3rd ed. 1971).

The uniform consensus of courts and legislative authorities has been to effect this delicate balance of interests through the imposition of civil or criminal liability after the fact, rather than by placing a prior restraint, in the form of prophylactic procedural safeguards, on the school official's exercise of his lawful discretion. This approach is justified by the fact, as plaintiffs note, that the teacher's abuse of this privilege is an exceedingly rare event. *Petitioners' Brief*, 48. It does not make sense, then to encumber the educational process with costly procedures designed to thwart an abuse of discretion that almost never occurs.

Plaintiffs now seek, however, to constitutionalize this area of sub-suspension disciplinary action by unnecessarily extending the rationale of *Goss* and, thereby, cast aside many years of judicial and legislative experience in supervising discipline in the public schools. The mechanism for accomplishing this objective is to reconceptualize the traditional interest of students to be free from physical interference and to exalt this interest to a constitutional absolute. This transformation is unwarranted; its inevitable effect will be to distract the federal courts from their proper business of protecting substantial federal rights. The Court of Appeals for the Third Circuit, sitting *en banc*, has recently expressed this concern in forceful terms:

We are concerned that . . . the proliferation of claims with exotic concepts of real or imagined constitutional deprivations may very well dilute protections now assured basic rights. We have a genuine fear of "trivialization" of the Constitution. If this should occur, some of the monumental accomplishments in defining fundamental human rights and liberties may be compromised, and the protections accorded those rights and liberties threatened.

*Zeller v. Donegal School District Board*, 517 F.2d 600, 607 (3rd Cir. 1975) (*en banc*) (footnote omitted).

In *Zeller*, which concerned student hair length regulations, the Court of Appeals recognized that the "very nature of the school system, public and private, requires that student liberties and freedom may not be absolute." *Id.*, 606. Applying the test stated by this Court in *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968), the Court of Appeals found that the asserted liberty interest did not rise to the dignity of a protectable constitutional interest because it did not directly and sharply implicate basic constitutional values. In such circumstances "the wisdom and experience of school authorities must be deemed superior and preferable to the federal judiciary's." *Zeller, supra* at 607.

Plaintiffs have failed to show that severe corporal punishment implicates any liberty interest protected by the Due Process Clause of the Fourteenth Amendment. Their reliance on the Fourth Amendment is misplaced because that Amendment will not support the generalized right to be free from unjustified physical assault. Moreover, the interest in reputation which they contend is protected by the Fourteenth Amendment is both insufficient as a matter of law and trivial as a matter of fact. Even if plaintiffs were able to demonstrate a liberty interest in this case,



they would not be entitled to notice and hearing prior to its curtailment. In order for this Court to find that due process applied, plaintiffs would have to show that notice and hearing are consistent with the traditional protection of Fourth Amendment rights, the limited nature of children's and students' constitutional rights, and the deference which federal courts must accord to local school officials who represent the ultimate democratic authority. In short, plaintiffs would have to show that corporal punishment "directly and sharply implicate[s] basic constitutional values." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Because plaintiffs have failed to carry this burden, the judgment of the Court of Appeals must be affirmed.<sup>8</sup>

### CONCLUSION

For the reasons set forth above, the Court of Appeals properly found that the use of severe corporal punishment as a method of school discipline neither constituted a cruel and unusual punishment, in violation of the Eighth Amendment, nor required notice and hearing prior to its use in order to satisfy the requirements of the Due Process

<sup>8</sup> Significantly, the federal court is not the only forum open for relief in these circumstances. If specific disciplinary action is not privileged, or if it is overzealous, plaintiffs have an adequate remedy at state law.

The state courts afford a competent and fair tribunal to determine the plaintiffs' claims. State judges should not be presumed to be less competent or conscientious than federal judges in safeguarding personal liberties or upholding federal law. *Stone v. Powell*, ..... U.S. ...., 96 S.Ct. 3037, 3051-3052 n.35 (1976). Obviously, there is no reason to suppose that state courts will not fairly or competently adjudicate state law claims.

Clause of the Fourteenth Amendment. The National School Boards Association therefore respectfully urges this Court to affirm the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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in the  
**Supreme Court**  
of the  
**United States**

October Term, 1976

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**No. 75-6527**

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JAMES INGRAHAM, by his mother and next friend,  
ELOISE INGRAHAM, and ROOSEVELT ANDREWS,  
by his father and next friend, WILLIE EVERETT,  
*Petitioners,*

*vs.*

WILLIE J. WRIGHT, I; LEMMIE DELIFORD;  
SOLOMON BARNES; EDWARD L. WHIGHAM;  
and THE DADE COUNTY SCHOOL BOARD,  
*Respondents.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit**

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**BRIEF OF THE UNITED TEACHERS OF DADE,  
LOCAL 1974, AFT, AFL-CIO, AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS**

---

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in the  
**Supreme Court**  
of the  
**United States**

October Term, 1976

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**No. 75-6527**

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JAMES INGRAHAM, by his mother and next friend,  
ELOISE INGRAHAM, and ROOSEVELT ANDREWS,  
by his father and next friend, WILLIE EVERETT,  
*Petitioners,*

*vs.*

WILLIE J. WRIGHT, I; LEMMIE DELIFORD;  
SOLOMON BARNES; EDWARD L. WHIGHAM;  
and THE DADE COUNTY SCHOOL BOARD,  
*Respondents.*

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On Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit

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**BRIEF OF THE UNITED TEACHERS OF DADE,  
LOCAL 1974, AFT, AFL-CIO, AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS**

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### CONSENT TO FILING

This amicus brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of all parties to the case.

### INTEREST OF AMICUS CURIAE

THE UNITED TEACHERS OF DADE, LOCAL 1974, AFT, AFL-CIO, ("UTD"), is an unincorporated labor organization which serves as the exclusive bargaining representative for 17,000 employees of the DADE COUNTY SCHOOL BOARD, Respondent herein. The majority of UTD's members are in fact classroom instructional personnel. The UTD was organized to:

"obtain and protect for all teachers and non-supervisory school employees all of the rights to which they are entitled in a free society;

create a positive and realistic image of teachers in the eyes of the public;

encourage and promote teacher involvement in community affairs;

promote the welfare of the children of Dade County by providing progressively better educational opportunities for all;

promote mutual assistance and cooperation of Dade County by providing progressively better educational opportunities for all."

[UTD Constitution Article III, Objectives, §§2,7,8,10,11.]

The UTD submits this Brief in the belief that the *en banc* decision of the United States Court of Appeals for the Fifth Circuit should be affirmed because its construction of the Constitutional precepts involved is correct as they apply to the common practice of corporal punishment in public schools of America. The teachers who constitute the members of amicus are firmly committed to the concepts that underpin the decision of the Court of Appeals below, since it was that Court's holding that corporal punishment is a valid disciplinary alternative for use in the schools and its utilization cannot create a Constitutionally recognizable tort. The terrifying growth of violence and fear in the public schools has come at a time when there are fewer and fewer societal resources being applied to the teaching of self-restraint and personal discipline. Amicus teachers stand on the frontlines in what all too often is the battleground of public education. Their interest in the Court's consideration of the case at bar is both obvious and paramount.

### ISSUES PRESENTED FOR REVIEW

#### I

WHETHER THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE OF THE EIGHTH AMENDMENT IS APPLICABLE TO THE ADMINISTRATION OF DISCIPLINE THROUGH [SEVERE] [OR ANY] CORPORAL PUNISHMENT IMPOSED BY PUBLIC SCHOOL TEACHERS AND ADMINISTRATORS UPON PUBLIC SCHOOL CHILDREN?



## II

DOES THE INFLICTION OF ANY CORPORAL PUNISHMENT UPON PUBLIC SCHOOL STUDENTS, ABSENT NOTICE OF THE CHARGES FOR WHICH PUNISHMENT IS TO BE INFLICTED AND AN OPPORTUNITY TO BE HEARD, VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT?

### STATEMENT OF THE CASE

The UNITED TEACHERS OF DADE rely upon and incorporate by reference herein, the Statement of the Case set forth in the Brief for Respondents.

### CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the United States Constitution:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution (in pertinent part):

"No state shall make or enforce any law which shall abridge the privileges or immunities of citi-

zens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected any person of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The Brief of the Respondents sets out in full both the old and the new statutes in Florida relating to corporal punishment in the public schools. These laws include Florida Statutes §232.27, §228.041, §230.23, §232.27, §232.275. These statutes are set forth in full on pages 2 through 5 of Respondents' Brief. In addition, the DADE COUNTY SCHOOL BOARD policy on corporal punishment with its revisions and implementing guidelines is reproduced in the Appendix at pages 125-132.

## SUMMARY OF ARGUMENT

### I

THE EIGHTH AMENDMENT HAS BEEN AND IS NOW LIMITED TO PUNISHMENTS ANNEXED TO CRIMES, AND SHOULD NOT BE EXTENDED TO CORPORAL DISCIPLINE IN PUBLIC SCHOOLS.

In *Paul v. Davis*, — U.S. —, 96 S.Ct. 1155, 1160 (1976), this Court emphatically rejected the expansion that many of us had sought in the injuries encompassed under 42 U.S.C. §1983, eliminating reinterpretation of the Civil Rights Statute as constituting "a body of general federal tort law." See also *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973); Prosser, *Torts*, §9 (4th Ed. 1971). Thus, the starting ground is whether or not there is a deprivation of a Constitutional right — not whether there was a wrongdoing in a specific instance that might inspire individual remedy. This Court has repeatedly told the educational community that it will not enter the schoolhouse door unless and until a Constitutional breach occurs. The Eighth Amendment has not been in the past, nor is it being in the present — save two instances lacking in analytical and logical depth — applied to create a federal cause of action for incidents of discipline in public schools, rather than incidents which arise in the context of the criminal justice system.

The Court of Appeals for the Fifth Circuit quite properly held that the Constitution's cruel and unusual punishment clause is restricted to the criminal law context. Interestingly enough, the trial court which was much more

generous to the plaintiffs in allowing a clear possibility that corporal punishment within a school might in fact rise to a level that would invoke the Eighth Amendment's protection, still concluded that:

"The undisputed facts regarding Ingraham and Andrews cannot demonstrate the elements of severity, arbitrary infliction, unacceptability in terms of contemporary standards, or gross disproportion which are necessary to bring 'punishment' to the Constitutional level of 'cruel and unusual punishment'." *Appendix*, 148-149.

So using the standard urged by Petitioners, the specifics of their case failed to convince the trier of facts who dismissed their cause at the end of the Plaintiff-Petitioners' presentation of evidence.

### II

ROUTINE CORPORAL DISCIPLINE IN PUBLIC SCHOOLS DISTURBS NO BASIC CONSTITUTIONAL INTEREST OF THE STUDENT AND THUS PROVOKES NO REQUIRED DUE PROCESS PROCEDURES.

Petitioners took the case of *Goss v. Lopez*, 419 U.S. 565 (1975) and ran unswervingly in the direction predicted by Mr. Justice Powell in his dissent to that decision. The Court of Appeals distinguished between the due process clause's requirement for a prior hearing in *Goss* and Petitioners' insistence on notice and a hearing to a student prior to the imposition of corporal discipline in the public



schools. The distinction found its base on the lack in *Ingraham* of a liberty or property interest sufficient to bring the Fourteenth Amendment into play.

With public employees such as the teacher members of amicus UTD still experiencing the shock waves of this Court's very recent decision in *Bishop v. Wood*, \_\_\_\_ U.S. \_\_\_\_, 96 S.Ct. 2074 (1976), expansion of the Fourteenth Amendment's hearing mechanism protections to the interest asserted by Petitioners is neither appropriate nor consistent with most recent pronouncements of this body. *Goss* had found a property interest (education) in the statutes of Ohio—in Florida, not only is there no statutorily created right to be free of bodily discomfort visited on a student during corporal discipline, there is specific statutory recognition that such action is acceptable.

The introduction of a neutral arbiter and dispenser of corporal discipline into public schools is neither desirable nor Constitutionally called for. It would in fact introduce a foreign element into the traditional context of school discipline in such a manner as to undercut the authority of the very persons held responsible under state law for maintaining classroom decorum and order. Due process does not dictate such an innovation and common sense rejects its legal and practical value.

## ARGUMENT

### INTRODUCTION

Both in the phrasing of their issues and in the major topic headings of their Brief, Petitioners have sought to distinguish routine corporal discipline from severe corporal

punishment. However, once they begin to define their terms, the distinctions melt into a warm puddle of obscurity. *E.g.*, Petitioners' Brief at p. 31, p. 44:

"The definition of 'severe' is drawn from the facts of this case. It means the repeated and continued infliction of bodily pain by an instrument designed to cause such pain."

. . .

"In the due process sense, 'severe' corporal punishment means the infliction of bodily pain by an instrument designed to cause such pain. That definition is drawn from the facts of this case. We do not include a brief hand spanking or a slapped face within the definition of 'severe' corporal punishment. But one 'lick' with a paddle, an instrument designed for the purpose of causing pain, is 'a severe though brief intrusion upon cherished personal security.' "

Petitioners contend that they are seeking only Constitutional protections for the infliction of "severe corporal punishment"—and then they define their terms, based on no authority or precedent, in such a manner that any classroom teacher (in fact, any Constitutional scholar) would be in doubt as to when, if ever, corporal discipline would *not* be "severe."

Any doubt that there was a reality to this surface distinction is eliminated by studying the testimony introduced at trial and the underlying theme of Petitioners' Brief. Starting on page 35 of their Brief and running through page 40, the implications become explicit. The Court is told that the difficulty inherent in tolerating *any* corporal pun-

ishment is addressed in *Jackson v. Bishop*, 404 F.2d 571 (8th Cir. 1968), the infamous Arkansas Prison strap case. After reciting the *Jackson* court's finding that excessive whipping or too great frequency of whipping or use of studded or over-long straps constituted cruel and unusual punishment, they end their *Jackson* quotation with the question: "But if whipping were to be authorized, how does one, or any court, ascertain the point which would distinguish the permissible from that which is cruel and unusual?" Then the Petitioners finally come out of the closet:

"These arguments strongly support a *total ban on corporal punishment* as the only effective way of insuring Eighth Amendment protections. See also 6Harv.Civ. Rights-Civ.Lib.L.Rev., *Corporal Punishment In The Public Schools*, 583, 585 (1971):

'While theoretically corporal punishment need not be brutal, there is no assurance that it will be inflicted moderately or responsibly. In the heat of anger, especially if provoked by personal abuse, some teachers are likely to exceed legal bounds. Moreover, if limited corporal punishment were permitted, controls would be unlikely to prevent the "really unmistakable kind of satisfaction which some teachers feel in applying the rattan."<sup>19</sup> A total ban of this punishment would provide far more effective control.<sup>20</sup>

[Petitioners' Brief at 36-37.]

<sup>19</sup>J. Kozol, *Dead at an Early Age*, 16-17 (1967).

<sup>20</sup>A rule forbidding all corporal punishment would probably receive more compliance than the common law principles because all parties involved are more likely to be aware of it and conscious of any violation. This would likely be reinforced by the added case of convicting a violator, simply by holding the school official involved in contempt of a court order, where injunctive relief is obtained.

The "authorities" from whom Petitioners derive their "intellectual" support—the psychologists and the National Education Association "Task Force Report on Corporal Punishment," all come down vehemently and unambiguously against the use of *any* corporal discipline in the schools. See, Petitioners' Brief at 40.

Amicus UTD will thus not artificially put its teacher members into the rather absurd role of risking Constitutional liability on a decision as to whether the discipline they wish to apply is "severe" or somehow "regular." The Petitioners are in fact seeking abolition of corporal punishment in the schools. That is the argument to which amicus wishes to respond.

## I

### THE EIGHTH AMENDMENT DOES NOT PRECLUDE CORPORAL PUNISHMENT IN PUBLIC SCHOOLS.

#### A. The Imposition of Corporal Discipline In Public Schools is Not "Punishment" Within the Scope of the Cruel and Unusual Punishment Clause.

Amicus UTD wishes to rely upon and incorporate by reference the excellent historical tracing of the cruel and unusual punishment clause contained in the Brief of the Respondents, pp. 18-22 and the similar treatment of the matter found in the Brief of National School Board Association as amicus curiae.



Amicus UTD would merely reiterate that the unadorned clarity of the Eighth Amendment speaks for itself. That Amendment provides simply that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Without esoteric reasoning or resort to mental subterfuge, only a single meaning attaches to the three prohibitions contained in the Eighth Amendment—that is, that these three matters would be found intolerable in the criminal justice system of the new nation as they had been found to be in the home country. (The exact language of the Eighth Amendment being lifted directly from the English Bill of Rights of 1689.)

**B. Controlling Judicial Interpretation Has Consistently Limited the Scope of the Clause to Punishments Inflicted Concurrent With, as a Result of or Subsequent to the Criminal Process; The Expansion of the Application of the Eighth Amendment Has Been Limited to Punishments Annexed to the Criminal Process.**

The Brief of the Respondents and amicus National School Board Association follow the careful study of precedent contained in the *en banc* decision of the Fifth Circuit of Appeals in this cause. After studying all of the precedents, the Court held:

"We do not find prisons and public schools to be analogous in the context of Eighth Amendment coverage. As discussed, *supra*, the function of the Eighth Amendment's prohibition against cruel and unusual punishments was intended to prevent the imposition of unduly harsh penalties for crim-

inal conduct. It is not an unreasonable interpretation of the Eighth Amendment to include within its coverage discipline imposed upon persons incarcerated for criminal conduct, since such discipline is part of the total punishment to which the individual is being subjected for his crime and, as such, is a proper subject for Eighth Amendment scrutiny. To extend the *Jackson* case from a prison context to a public school situation would, however, distort the intended scope of the Amendment."

[*Ingraham v. Wright*, 525 F.2d 909, 914-15 (5th Cir. 1976) (*en banc*).]

**C. Extension of the Eighth Amendment to School Discipline is Neither Precedentially Consistent Nor Constitutionally Desirable.**

Surely no Circuit more than the Fifth Circuit has enthusiastically bounded in where angels fear to tread if heavenly creatures are in fact phobic regarding public institutions of education. Yet in this instance, the Fifth Circuit resoundingly rejected new inroads into school autonomy.

In *Milliken v. Bradley*, — U.S. — (1974), (dissent, White), it was stated:

"[B]ut the courts must keep in mind that they are dealing with the process of *educating* the young, including the very young. The task is not to devise a system of pains and penalties to punish Constitutional violations brought to light."

And, again in the school context, the majority in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) said much the same thing:

"In seeking to define even in broad and general terms how far this remedial power extends, it is important to remember that judicial powers may be exercised only on the basis of a Constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only where local authority defaults."

In the desegregation cases of the last quarter century, we were repeatedly told that the schools were designed to educate and that only the grossest of Constitutional deprivations had caused the courts to interpose themselves in the educational process. Those cases seem very—and, though the pun may be painful, the point is legitimate—black and white in comparison to the present Petitioners' requests.

Having experienced and even acted as a major catalyst in bringing about the integration of the Dade County schools the UNITED TEACHERS OF DADE wish to offer some of the hard-learned lessons of the desegregation years in the context of the present disciplinary crisis in the schools. With integration, we saw society pushing the public schools to do that which society itself was unwilling to do—that is, alter the American people's actual behavior in the race relations field so as to achieve true equality of the races. Painfully, teachers and school children became pawns in a master chess game of what should have been societal revamping and what proved instead to be, in many

instances, limited restructuring of single institutions with some inevitable overflow to other areas. Society chose to make its morally and legally commanded gestures towards equality in as narrow a field as possible, focusing more and more as the years went by on the public schools. Teachers saw their dedication to educational equality undercut on every side by the vacuum in which the schools existed with no societal endorsement of complete desegregation nor the practical means of achieving it. The lack of commitment on the outside world to the inspiring achievements of the educational cloister, has brought incredible pressures, confusion and unrealistic goals to the teaching profession.

In seeking to prohibit corporal discipline in the schools under the guise of an amazingly expanded Eighth Amendment concept, teachers find themselves once more facing the possibility of a solitary experimental effort without societal support. Study after study, newspaper expose' after newspaper expose', Presidential Commission Report and Ph.D. thesis and community bi-racial committee recommendation alike—have all found a lack of parental guidance in today's society, a lack of community commitment to and involvement in the increasingly undisciplined youth of America. There is an expanding expectation on the part of the community for the school system to accept full responsibility for all social ills. This expectation emerges at the same time that we find reduced school funding which results in the elimination of many school programs designed to bring about changes in student behavior and in ever-larger class size of instructional units. With an increase in crime at all levels, there is still shocking dismay at the statistics on school violence.



A Senate Subcommittee recently released a preliminary report showing approximately 70,000 serious physical assaults on teachers each year, literally hundreds of thousands of assaults on students, including more than 100 students murdered in 1973 in only the 757 school districts surveyed, and confiscation of 250 weapons in one urban school district in one year. ["Our Nation's Schools — A Report Card: 'A' in School Violence and Vandalism," Preliminary Report of the Subcommittee to Investigate Juvenile Delinquency, by Senator Birch Bayh, Chairman, to the Committee on the Judiciary of the United States Senate (April 9, 1975).]

McClung, "Alternatives to Disciplinary Exclusion From School", 20 Inequality In Education 58, 60, 71 (1975).

Clearly, both the governmental entities and familial units must be motivated to provide an atmosphere in which discipline is not a term of art that has no realistic chance for achievement. The pragmatic limits of what can be accomplished by the school system acting in isolation are starkly clear to the teachers. Corporal discipline is not an educator's natural inclination and is a tool of last resort. But the schools which the Dade County Grand Jury found to contain "no certainty of punishment existing for youngsters who break the law at school," are schools in which the courts owe the educators the right to choose from the full array of traditional disciplinary methods. Dade County, the sixth largest system in the Country, is experiencing — perhaps in lesser form — the same "combat conditions" of many urban schools. The teachers and administrators must have the ability to utilize the full panoply of disciplinary methods in working to achieve a safe educational atmosphere.

The statistics in Dade County read much like the National statistics:

Assaults on teachers and other school personnel, 235 this year, 201 the year before (up 17%).

Assaults on students, 761 this year, 841 a year ago (down only 7%).

Break-ins, up 12%, from 1,632 to 1,830.

Vandalism, virtually the same, 1,203 this year, 1,214 last year (but damages up by several thousand dollars).

Personnel under investigation by the security department, up about 44%, from 61 to 88.

Drug offenses, including drinking, down about 25%, from 169 to 131.

Carrying or using weapons, down by  $\frac{1}{3}$ , from 72 cases to 46.

Trespassing, up 14%, from 32 to 373.

Sex offenses, up 44%, from 32 to 46.

Disorderly conduct, up from 95 to 244 (almost 160% jump, mainly attributable to change in classifying simple assault that might include fights between two students or verbal insults). The largest single category each year has been larcenies — about 2,200 incidents reported each

year. About 2,000 other reports each year involved burglar alarms that sounded, but for which investigation failed to produce a cause or evidence of a break-in.

[Berger, "Violence in Schools Unabated," *Miami News*, June 21, 1976.]

With the numbers painting only a small portion of the picture, recent headlines regarding the disruption of learning and the frustration of teachers and students in the schools is not surprising. Miami and Dade County's experiences are not unique. As Mr. Justice Powell said in his dissent in *Goss*, 419 U.S. at 591-592:

"[I]t is common knowledge that maintaining order and reasonable decorum in school buildings and classrooms is a major educational problem which has increased significantly in magnitude in recent years."

Petitioners have paraded their aberrations in the disciplinary system before a Federal Judge who accepted their Constitutional arguments that the Eighth Amendment could in fact be applied to use of corporal punishment as a disciplinary measure in public schools. That trial Judge, Judge Joe Eaton, could find no deprivation of Constitutional proportions in the Plaintiffs' evidence. And, of course, Plaintiffs were utilizing the most extreme examples that could be found within the County. *Amicus UTD does not condone abuse of corporal discipline*. If and when such abuse occurs, the state courts have shown no

reluctance to offer a full and adequate remedy. This is not stated ignorant of the existence of *Monroe v. Pape*, 365 U.S. 167 (1941). It is stated solely as reassurance to the Court that since no Constitutional interest is invoked, there is in fact still a remedial avenue available for truly excessive corporal punishment.

The Legislature of Florida has authorized the teacher to "keep good order in the classroom and in other places in which he is assigned to be in charge of students." The new statute, passed this term to deal with the very disciplinary crisis discussed above, speaks specifically of corporal punishment and indicates that except in cases of excessive force or cruel and unusual punishment, a teacher or other member of the instructional staff, a principal of his designated representative, or a bus driver, shall not be civilly or criminally liable for any action carried out in conformity with state board and district school board rules regarding the control, discipline, suspension and expulsion of students. *Florida Statutes* §232.275. The school boards have in fact been specifically denied the ability to prohibit the use of corporal punishment in their district. *Florida Statutes* §230.23(c). Apodictically, corporal punishment is endorsed by the Legislature of Florida as an acceptable means of achieving discipline and a teacher or principal stands liable should he abuse that acceptable tool by excessive or cruel and unusual punishment.

The emphasis on "punishment" in the Eighth Amendment arguments creates an atypical situation unreflective of the classroom norm. Teachers are not called to their profession as quasi-correctional personnel. Teachers are there to teach. In order to achieve just that — the teaching of the students who are there to learn, teachers have had



to become disciplinarians by necessity. Corporal punishment is one method which teachers occasionally utilize in an effort to make the classroom a place where students can learn rather than merely endure. The "punishers" are, in fact, merely educators trying to protect the right to learn for those students who utilize the public school system for its most obvious function.

The Fifth Circuit, in its *en banc* decision, gave a thoughtful, careful analysis to the legal precedents and historical context of the Eighth Amendment's application. It was correct in its decision that the Eighth Amendment need not Constitutionally be extended into the classroom.

## II

### CONSTITUTIONAL DUE PROCESS PROCEDURES PRIOR TO ANY USE OF CORPORAL DISCIPLINE IN PUBLIC SCHOOLS ARE NOT THEORETICALLY REQUIRED NOR WORKABLE IN PRACTICE.

As amicus illustrated in its introduction to this argument, Petitioners have in effect told us in one breath that their argument should be limited to "severe corporal punishment" and, in the other breath, defined that phrase so as to encompass almost all forms of physical discipline. The exclusion of the striking of hands or slapping of faces is inconsistent and a bit incredible. In the famous scene in *Gone With The Wind*, when Scarlett slaps Rhett's face, the shock was absolute. You caught your breath! The distinction between the laying on of hands and the utilization of a paddle is so obscure as to satisfy none save the most modern of poets. It will not serve as a standard for a more prosaic court of law.

In their first argument, Petitioners ostensibly were only asking for a Constitutional prohibition against "severe corporal punishment." However, in a footnote, they explained to any of us who might be too obtuse to have picked it up by ourselves, that it would be terribly difficult to establish exactly when a punishment was severe; so, in fact, the only truly effective prohibition would be an across-the-board elimination of corporal punishment. Then, in their second argumentative section, Petitioners begin from the initial premise that: "The infliction of *severe corporal punishment* upon public school students absent notice of the charges for which punishment is to be inflicted and some opportunity to be heard, violates the due process clause of the Fourteenth Amendment." But, in a short time, the definition is offered in Petitioners' footnote 19 that everything save "a brief hand spanking or a slapped face" comes within the definition of severe corporal punishment — including "one lick with the paddle."

The Petitioners have mitigated their due process demands somewhat, backing off from the original three-judge panel decision of the Fifth Circuit and its labyrinth of procedural checkpoints. This seeming lessening of demand may simply be an accurate prediction on the Petitioners' part that they can accomplish their ultimate goal — the elimination of corporal punishment in all forms — with less than the original panel gave them. So the "minimal procedures required" by Petitioners' reasoning are: (1) notice of the charges and an opportunity to be heard and (2) a neutral person to decide the need for the punishment and impose it if necessary. The National Education Association in its Brief as amicus curiae in support of the Petitioners, p. 13, unabashedly closes their eyes to the surface

limitations of "severe" punishment and simply request full and procedural rules "whenever corporal punishment is to be administered."

The concern of amicus UTD is simply stated: That the Petitioners will accomplish indirectly that which they cannot accomplish directly. If their arguments regarding abolition of corporal punishment under Eighth Amendment standards are rejected by this Court, and they fall back upon the procedural due process aspects of the case, they may just effectuate that abolition for which the Court would have found no Constitutional justification.

In *Paul v. Davis*, — U.S. —, 96 S.Ct. 1155 (1976), the plaintiff was faced with the same problem with which Petitioners must contend. The court felt that there was no showing of a specific Constitutional guarantee safeguarding the interest the plaintiff asserted was being invaded. Mr. Davis apparently believed:

"that the Fourteenth Amendment's due process clause should ex proprio vigore extend to him a right to be free of injury wherever the state may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states. We have noted the 'Constitutional shoals' that confront any attempt to derive from Congressional civil rights statutes a body of general federal tort law, *Griffin v. Breckenridge*, 403 U.S. 88, 101-102, 29 L.Ed.2d 338, 91 S.Ct. 1790 (1971); a fortiori the procedural guarantees of the due process clause cannot be the source for such law."

Since Petitioner's Brief was written after *Paul v. Davis* was rendered, there was the creation of a new element in the case — a Fourth Amendment protection of the person theory. This doctrine is newly aired to this Court and is in direct response to the Petitioners' difficulties following *Paul v. Davis*. Even if this newly risen concept were accepted by the Court, there is still the Court's instructions that "the scope of the remedy is determined by the nature and extent of the Constitutional violation." If that be so, then the finding by the trial court and the admission by the Petitioners that the entire Dade County school system was not involved in excessive use of corporal discipline and that the Drew Junior High School instances stood alone, shows that the remedy sought does not fit the nature and the extent of any potential Constitutional violation. The instance of abuse is the rare and dramatic example — the utilization of what the Florida Legislature has defined as corporal punishment, i.e., "the moderate use of physical force or physical contact by a teacher or principal as may be necessary to maintain discipline or to enforce school rules" is the less exciting stuff of which daily classroom discipline is made.

For example, amicus can trace its own involvement as a teachers' organization in the discipline field in Dade County schools for the last decade and it makes rather dull reading. In 1966 the wheels were set in motion for union participation on the Coordinating Committee for Discipline. This began in 1967 and the organization drew up guidelines for what the union termed "Organization for Discipline Improvement." That report has been renewed and updated and presented annually to the School Board until some small portions of it have finally emerged as facts of school life. One of the basic assumptions was that dis-



ruptive students did not belong in a regular school. There was a call for a lack of toleration within the classroom for rudeness, disrespect, physical violence, vandalism, lack of effort, truancy and tardiness. They pled for greater principal and teacher authority in administering discipline and suggested an in-service program in discipline to be instituted by the School Board. The group gave birth to the forerunner of today's In-House Suspension Program and asked for special classrooms to be set up for students in need of help in developing more adequate self-concepts. They sought increased visiting teacher staff. The concept of centers for special instruction for consistently negative, disruptive students was evolved.

All this came out in 1967 and was pushed again and again before the proper bodies. New twists developed as the teachers learned more about the potentials of alternative behavior modification programs. One of the basic premises was that no consistently disruptive student who was sent into a rehabilitative educational program or a special center should be allowed to return to regular classrooms until a mandatory conference had been completed between the student's parents and the principal and teacher. Yearly explanations were sought of current corporal punishment standards and requests were made of the administration to show full support in the area of the classroom instructional personnel. Each year parents and interested citizens were invited to contribute ideas to the union for the improvement of discipline in the schools.

By 1969, the union had added to its requests the need for the establishment of student forums with teacher supervision to allow students legitimate methods to air grievances and discuss issues. In 1970, the union proposed a

School Discipline Code which included within it the concept that teachers had the right and duty to enforce obedience to orders and that teachers had the right to exclude disruptive students from their classrooms. If all in-house and special class attendance efforts failed, then the final measures of suspension or expulsion should be turned to.

In 1971, the union distributed information on the results of the current Gallup Poll which showed that Americans considered discipline to be the number one problem in the schools nationwide. Some 53% of those surveyed felt that school discipline was not strict enough. In an interesting sidelight, the same poll showed 23% of the high school students themselves believed that school discipline was lacking in strictness.

In each year's presentation, the union would stress the need to exclude the disruptive student from the regular classroom so that non-disruptive students could continue the learning process. The vast majority of disruptive students stayed in the regular classrooms and teachers were left to deal with them as best they could.

Correlative with the efforts to arouse the community for the need for a wider base of involvement in school discipline was a legislative lobbying effort on the union's part. The legislative positions pushed during that decade included the need for professional liability insurance for instructional personnel; a requirement for school boards to reimburse teachers for personal property loss due to vandalism or other illegal acts; a requirement that school boards purchase \$100,000 life insurance for the protection of families of teachers who may lose their life in the per-

formance of their duty; and a revision of the state funding program to provide for centers for disruptive children who had been expelled. And, always, both to the Legislature and to the School Board, the union sought the reduction of class size so that there would be an opportunity for a controlled environment of learning.

By 1972, the union's efforts before local authorities and the State Legislature had begun to bear some fruit. At that time, the Executive Director of the union, Pat L. Tornillo, Jr., outlined the six basic reasons for the sharp increase in student disruptions: (1) increased class size; (2) lack of equipment and materials; (3) schools operating in isolation of the community; (4) parental laxity; (5) outside school distractions; and (6) lack of support on behalf of the Legislature, the public and school administration. Court cases began arising during this period of time in which parents and children sought monetary compensation for corporal punishment administered in the school. The fear of the teachers that there was little support for their consistent efforts to improve discipline and possible civil liability awaiting them should they follow through with their own efforts, was disheartening and discouraged independent disciplinary action.

In 1973, the union had the satisfaction of seeing the Dade County School Board vote to institute on-site school centers for in-house suspensions and by the end of the year, several such centers were actually operating. Then, in 1974, the three-judge panel decision of *Ingraham v. Wright* came down. Elaborate due process protections for students prior to the application of corporal punishment were dictated when the Florida Attorney General issued an Opinion stating that this was necessary under the Fifth Cir-

cuit's decision. One more alternative for discipline was virtually eliminated for the classroom teacher. But, the legislative efforts and the dedication to the improvement of discipline went on, even within those restrictions.

The decade was culminated with the passage in June of 1976 of the Students Responsibility/Discipline Bill. That act is set forth in pertinent part in the Respondent's Brief, 3-5. Besides establishing a state policy in favor of corporal punishment and excluding the possibility of individual districts prohibiting such disciplinary tool, the act sets out the following standards for when "a teacher feels that corporal punishment is necessary":

- (1) The use of corporal punishment shall be approved in principle by the principal before it is used, but approval is not necessary for each specific instance in which it is used.
- (2) A teacher or principal may administer corporal punishment only in the presence of another adult who is informed beforehand, and in the student's presence, of the reason for the punishment.
- (3) A teacher or principal who has administered punishment shall, upon request, provide the pupil's parent or guardian with a written explanation of the reason for the punishment and the name of the other teacher or principal who was present."

[Florida Statutes §232.27.]



This is the Bill that the teachers worked 10 years to achieve. They did it in cooperation with the School Board and other concerned institutions. The teachers were there fighting for it before anyone else simply because they are in the classroom and live the problem. Others have now joined the fight. Community efforts are underway at this time in Dade County to bring about school/community/inter-agency team approaches to school discipline. A basic realization that the school cannot solve the problem of disruptive youth all by itself is finally being accepted.

This brief history of the amicus union's involvement in school discipline in Dade County is offered not as a litany of self-satisfaction, but, rather, as a living example of the involvement and intimate dedication to detail that those who are in the classroom have already devoted to the situation and are continuing so to do. The inappropriateness of federal intervention in such an instance is clear.

"Judicial interposition in the operation of the public school system of the nation raised problems requiring care and restraint . . . By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operations of school systems and which do not directly and sharply implicate basic Constitutional values."

[*Epperson v. Arkansas*, 393 U.S. 77, 104 (1968).]

More recently this Court held in *Meachum v. Fano*, — U.S. —, 96 S.Ct. 2532, 2538 (1976):

"[H]old as we are urged to do that *any* substantial deprivation imposed by prison authorities triggers the procedural protections of the due process clause would subject to judicial review a wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than that of the federal courts."

The emphasis of Petitioners and in a way, Respondents' answers thereto, have focused, as so frequently must be the case, on the problem child rather than the good kid. Whether and when and how the disruptive child will be disciplined is a genuine concern. But amicus would pray that this Court focus its attention on the plight of the child who never becomes a statistic for a newspaper expose on school violence other than as a victim. This is the child that the public school system of this Nation was designed to serve. Amicus UTD and each of its members are devoted in professional and personal commitment to the concept that the child who enters the classroom to learn must be given a chance and the teacher who enters the classroom to teach that child, must similarly have the opportunity to offer his lessons in an atmosphere free of disorder. When there is no direct or sharp conflict with Constitutional values, as none has been demonstrated in the case at bar, then "the wisdom and experience of school authorities must be deemed superior and preferable to that of the federal judiciary." *Zeller v. Donegal School District Board*, 517 F.2d 600, 607 (3rd Cir. 1975) (*en banc*).

It is the classroom teacher that in the final analysis must make the learning process work. Teachers and school administrators have too often served as society's scapegoats. The second the learning process falters, the schools and the teachers are criticized. No profession other than the American teachers have ever been subjected to any vaguely comparable set of conflicting pressures and demands. Teachers are finally saying — hold on now! We became educators by choice and we've given our training and years of public service to raise tomorrow's citizenry. We cannot, however, assume the total responsibility of each generation while being given fewer and fewer tools to deal with a more and more explosive situation.

Surely it is clear that amicus is not seeking to disregard the rights of its young charges. The discipline bill that amicus union was so instrumental in getting passed by the Legislature has within it numerous protections and procedural standards for the application of all forms of discipline, including corporal punishment. The question to this Court is whether Petitioner has met its burden to prove the deprivation of a Constitutional right of a magnitude sufficient to bring federal Constitutional due process protections into play. The state protections are there. The teachers helped to get them. However, amicus believes that the Court of Appeals for the Fifth Circuit was correct in its decision that no liberty or property interest is implicated by the use of corporal punishment as a school disciplinary measure.

## CONCLUSION

As the increase of discipline problems in the schools threatens to disrupt the educational program and deny the majority of students the right to learn and the teachers the right to teach, amicus UNITED TEACHERS OF DADE joins with the Respondent, DADE COUNTY SCHOOL BOARD in a firm, compatible stand in favor of allowing local and state flexibility in choice of disciplinary methodology, including within that range of choice, the use of corporal punishment as defined by the Florida Legislature. The *en banc* decision of the Court of Appeals for the Fifth Circuit has thoughtfully and comprehensively examined Petitioners' arguments regarding prohibition of corporal punishment by the Eighth Amendment and the necessity for federal due process procedures under the Fourteenth Amendment. The *en banc* Court found Petitioners' position wanting and that decision should be affirmed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

Supreme Court, U. S.

FILED

OCT 18 1976

MICHAEL RODAK, JR., CLERK

No. 75-6527

JAMES INGRAHAM, by his mother and next  
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ANDREWS, by his father and next friend,  
WILLIE EVERETT,

*Petitioners,*

v.

WILLIE J. WRIGHT, I; LEMMIE DELIFORD;  
SOLOMON BARNES; EDWARD L. WHIGHAM;  
and THE DADE COUNTY SCHOOL BOARD,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

**REPLY BRIEF FOR PETITIONERS**

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(i)

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**REPLY BRIEF FOR PETITIONERS**

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**DECISIONS BY LOWER FEDERAL  
COURTS SUPPORT THE CONCLUSION  
THAT THE EIGHTH AMENDMENT IS NOT  
LIMITED TO PUNISHMENT IMPOSED FOR  
CRIMINAL OFFENSES.**

The petitioners limit this Reply Brief to one point: the narrow interpretation of the cruel and unusual punishment clause of the Eighth Amendment advanced by the respondents. Both respondents and *amici curiae* supporting the respondents' position view the clause as being limited to punishment imposed for criminal offenses.

If that reasoning were adopted, it would threaten the integrity of a host of decisions which have applied the Eighth Amendment to persons in custody on non-criminal matters who are not being "punished." See, *Knecht v. Gillman*, 488 F.2d 1136 (8th Cir. 1973) (mental institution inmates); *Vann v. Scott*, 467 F.2d 1235 (7th Cir. 1972) (runaway children in state training schools); *Inmates of Boys' Training School v. Affleck*, 346 F. Supp. 1354 (D.R.I. 1972) ("wayward", non-criminal, boys in state training school); *Martarella v. Kelley*, 349 F. Supp. 575 (S.D.N.Y. 1972); (children in need of supervision as a result of non-criminal problems confined in juvenile detention centers).

Under the respondents' theory, the Eighth Amendment might also be inapplicable to pre-trial detainees who are not held in jails for punishment, but reside there because they are unable to make bail. See, *Jones v. Wittenberg*, 323 F. Supp. 93 and 330 F. Supp. 707 (N.D. Ohio 1971); *Collins v. Schoonfield*, 344 F. Supp. 257 and 363 F. Supp. 1152 (D. Md. 1972 and 1973)

and *Johnson v. Lark*, 365 F. Supp. 289 (E.D. Mo. 1973); decisions which applied the protection of the cruel and unusual clause to presumptively innocent pre-trial detainees.

We recognize that the instant case, unlike those cited above, involves no detention. But we bring these cases to the Court's attention to buttress our argument that the cruel and unusual punishment clause has evolved since its adoption and is not limited to punishment imposed by the criminal justice processes.

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